

NOTE

The Victim in Chinese Criminal Theory and Practice: A Historical Survey

In recent years the legal world has rediscovered a lost party in the criminal process: the victim. In response to an increasingly powerful victims' rights movement, politicians and judges alike have shown renewed concern for the interests and needs of the long-suffering object of crime. In 1965, California became the first state to pass legislation providing compensation to crime victims. The vast majority of states have since adopted similar statutes.¹ In addition, over 2000 government and private organizations, including the National Organization for Victim Assistance (NOVA), presently offer assistance to victims.² In 1981, President Reagan demonstrated conviction to the cause by declaring the week of April 19th "National Victims' Rights Week," an annual practice imitated by numerous state governors.³ Further testimony to the mass appeal of the victims' movement lies in the avalanche of victim-oriented legislation, including the Omnibus Victim and Witness Protection Act of 1982.⁴ The impact of the movement has even reached the Supreme Court.⁵

1. Frank Carrington & George Nicholson, *The Victim's Rights Movement: An Idea Whose Time Has Come*, 11 *Pepp. L. Rev.* 1, 2 (1984).

2. *Id.*

3. *Id.* at 2-3.

4. Pub. L. No. 97-291, 96 Stat. 1248. The Act provided for victim impact statements at sentencing, protection of victims and witnesses from intimidation, and restitution to victims of federal crimes from offenders. By 1975, Congress and state legislatures had enacted over 1,500 victim-oriented statutes and programs. Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 *Wayne L. Rev.* 51, 52 (1987).

5. Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights" — a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that

Heightened sensitivity to the victim is not merely a domestic phenomenon. International conferences on the plight of the victim have been held in Israel, the United States, West Germany, Canada and Japan.⁶ In 1986, the United Nations issued an influential proclamation calling for government compensation to crime victims and a more active role for victims in criminal proceedings.⁷ Tremors of the victims' movement have also been felt in the People's Republic of China ("PRC"), as registered by a host of recent law review articles on victim-related issues.⁸

In this Note, I examine the role of the victim in Chinese criminal legal theory and practice. Part I sets forth the theoretical arguments often advanced in the contemporary western legal literature for and against heightened attention to the victim in the criminal process.⁹ Part II considers the place of the victim in four schools of Chinese legal

drove the defendant to commit his crime, with no one to lay before
the sentencing authority the full reality of human suffering the
defendant has produced. . . .

Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

6. For a history, see Su Huiyu and Lin Jianhua, *Guan yu 'Gongzheng duidai he lanyong quanli de beihai ren de jiben yuanzi xuanyan' shuping* [Assessment of the [United Nation's] "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power"], 3 *Faxue Yanjiu* 41, 41-42 (1991).

7. G.A. Res. 40/34, 40 U.N. GAOR, Supp. No. 53, at 213-15, U.N. Doc. A/40/53 (1986). See also LeRoy Lamborn, *The United Nations Declaration on Victims: Incorporating "Abuse of Power,"* 19 *Rutgers L.J.* 59 (1987).

8. See, e.g., Chen Yue, *Beihairen xue chutan* [Victimology Propaedeutic], 4 *Faxue Yanjiu* 64 (1986); Xu Zhangrun, *Lun fanzui beihai ren* [On Crime Victims], 1 *Zhengzhi Luntan* 30 (1990); Xia Chenghua, *Guanyu xingshi beihai ren fanwei de tantao* [Discussion of the Scope of Crime Victims], 6 *Faxue Yanjiu* 37 (1990); Pei Cangling, *Lun xingshi beihai ren de susong diwei* [On the Position of Crime Victims in Litigation], 3 *Faxue Zazhi* 18 (1989); Shen Chanpei, *Beihai ren de jinqinshu weituo lushi danren dailiren canyu gongsu zhi guanjian* [On the Close Relatives of the Victim Entrusting Lawyers as Their Legal Representative in Publicly Prosecuted Suits], 5 *Faxue Zazhi* 45 (1985); Huang Mingli, *Gongsu anjian de beihai ren yingyou shangsu de quanli* [Victims Ought to Have the Right to Sue in Publicly Prosecuted Cases], 31 *Faxue Jikan* 18 (1987); Wang Yanjun, *Beihairenhua wenti quyi* [Trends in Victims' Movement Concerns], 3 *Faxue Yanjiu* 36 (1990); Su Huiyu & Lin Jianhua, *supra* note 6.

9. The point is not simply to compare the status of the victim in the United States and contemporary China, much less to compare the current status of the victim in the United States to that of the victim in premodern China. Though such comparisons may be illuminating, one must be sensitive to differences in historical and cultural traditions. The main reason for beginning with a survey of the victim in the U.S. is that more scholarly, legal, political and popular attention has been given to the victim in the U.S. than in China. Hence the plight of the victim, and the difficulties in remedying that plight, have been more fully explored. A clearer picture of the benefits and costs of the victims' movement will better enable one to assess whether China needs victim reform, and if so, what the specifics of that reform should be.

thought: Confucianism, Legalism, Huang-Lao,¹⁰ and Marxist-Leninism. Part III explores the role of the victim in premodern Chinese legal practice. Finally, Part IV addresses the victim's role in socialist China.

To cover the tremendous timespan under consideration — from the late Warring States Period to the present — it will be necessary at times to paint with a broad brush. However, a broad study of this type is made possible by the limited role of the victim in the formal criminal process. As will be shown *infra*, the interests of the victim, though not completely ignored, have taken a back seat to the state's interest in social order.¹¹

Further, although there were certainly countless significant developments in the Chinese legal system from the Han to the Qing, there was nevertheless a remarkable continuity as well. For instance, a surprisingly large number of Tang statutes are replicated virtually verbatim in the Qing Code.¹² Similarly, many of the features relating to treatment of the victims in earlier dynasties survive in later ones, thus facilitating discussion. Finally, only recently has the victim in China begun to receive much attention. For the most part, the victim has been

10. Huang-Lao is a school of ancient Chinese thought that attempts to synthesize Daoist, Legalist, and to some extent Confucian ideas. Until recently, little was known of this school other than that it provided the dominant court ideology of the early Han, losing favor abruptly around 140 B.C. when Han Wu Di, siding with the New Text Confucians and Dong Zhongshu, banned Huang-Lao from court. The importance of the school for present purposes is that it provides the intellectual foundation for what many consider to be the dominant characteristic of Chinese penal theory: namely, the notion of cosmic harmony whereby disruption of the social order through criminal acts causes a corresponding rupture in the cosmic order that can only be put right through punishment finely calibrated to fit the crime. In grounding law in the natural order, Huang-Lao provides the well-spring for what has become known as the "naturalization" of Chinese law. For the cosmic harmony view of Chinese law, see, e.g., A.F.P. Hulsewe, 1 Remnants of Han Law 103-109 (1955); Derk Bodde & Clarence Morris, Law in Imperial China 4, 43-48 (1967). But see Geoffrey MacCormack, Traditional Chinese Penal Law 40-45 (1990). See also *infra* notes 71-80 and accompanying text. For works in English on Huang-Lao, see Karen Turner, The Theory of Law in the Ching-fa, 14 Early China 55 (1989); Jan Yun-hua, Tao, Principle, and Law: The Three Key Concepts in the Yellow Emperor Taoism, 7 J. Chinese Phil. 205 (1980); R.P. Peerenboom, Natural Law in the Huang-Lao Boshu, 40 Phil. East & West 309 (1990); Peerenboom, Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao (1993) [hereinafter Law and Morality].

11. To be sure, historically the formal legal system has been supplemented by an array of informal mechanisms for dispute resolution. The victim may very well have fared better in these informal forums. Space limitation and insufficient information make comprehensive treatment of such alternative methods impossible, though a few remarks will be made in passing.

12. Xue Yunsheng estimates that 30 to 40 percent of Qing Code statutes are handed down without change from the Tang Code. Bodde & Morris, *supra* note 10, at 63.

ignored not only by the legal system but by legal scholars. Perhaps for this reason alone a historical overview such as this is in order.

I. THE VICTIM IN WESTERN CRIMINAL THEORY AND PRACTICE

Many early western legal systems showed concern for the victims of crime. The Code of Hammurabi (ca. 2380 B.C.) endorsed victim restitution for both theft and loss of life. Indeed, the Code even obliged the government to compensate the victim if necessary: "If a robber has not been caught . . . the city and the governor [in] whose district and territory the robbery was committed, shall replace for him his lost property;" "if it was a life that was lost, the city and governor shall pay one mina of silver to his heirs."¹³ Other legal systems, including the Greek, Roman, and Anglo-Saxon, also called for victim restitution by either the criminal or the community.¹⁴

The victim even figured prominently in the criminal process of the United States until the early 19th century, often participating in the apprehension and prosecution of the criminal.¹⁵ Nevertheless, as a recent Presidential Report observed, "[s]omewhere along the way, the [U.S.] system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest."¹⁶ Explanations as to how this sorry state came to be are many.

Some have attributed the victim's diminished status to the professionalization of the criminal system.¹⁷ We no longer live in a vendetta society where a wronged party (or his family, clan or tribe) extracts his due from the offender. Justice is better served, the argument goes, by a professional police force and judiciary than by private citizens who, seeking vengeance, take the law into their own hands. The victim need not become embroiled in the criminal process, except

13. C.H. Gordon, *Hammurabi's Code: Quaint or Forward Looking?* 4-6 (1960).

14. Stephen Schafer, *Restitution to Victims of Crime* 3-6 (1960); New York State Crime Victims Compensation Board, *The Crime Victim and the Criminal Justice System: A Report to the Governor and the Legislature on the State of the Rights, Needs and Interests of Crime Victims in the Criminal Justice System* 14 (1982) [hereinafter *New York Report*], cited in Hudson, *infra* note 14.

15. William McDonald, *Towards a Bicentennial Revolution in Criminal Justice*, 13 *Am. Crim. L. Rev.* 649, 651-54 (1976); Paul Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 *Pepp. L. Rev.* 23 (1984).

16. President's Task Force on Victims of Crime, 1982 Final Report vi (1982) (statement of Lois Haight Herrington, Chairperson).

17. See Hudson, *supra* note 15, at 24.

perhaps as a witness. Investigation, sentencing, punishment and the like are best left to the state.¹⁸

Others have attributed the shift to a defendant-centered criminal process to the disproportionate power of the state: "Because of the great power of the state and the potential for abuse, as well as the potentially unjust impact on the accused if a mistake is made, persons accused or suspected of committing crimes need to be cloaked with a great array of procedural rights, privileges, and safeguards."¹⁹ To protect the rights of the innocent, the system is focused on the defendant, and weighted in his favor. For instance, U.S. rules of evidence allow evidence of the law-abiding character of the defendant but preclude the same with regard to the victim.²⁰

Perhaps the most plausible explanation of the lowly status of the victim is that a crime is considered an offense against the state and public order rather than a private wrong. As one commentator put it, "The American system is founded on the principle that violations of penal laws are an affront to the society as a whole, the presence or absence of an individual victim who has been harmed by the accused's conduct is irrelevant."²¹

Whatever the reason, the result is an increasingly defendant-focused criminal process dominated by professionals. A by-product, according to critics, is that "[t]he innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds — personal, emotional and financial — have gone unattended."²² A

18. As discussed *infra* Parts III and IV, China has yet to attain the same degree of professionalization of its criminal justice system. Since 1949, China has oscillated between fervent support for a professional legal system and insistent calls for a less technical, "mass line" form of people's justice. Furthermore, in all periods of Chinese history, conflicts normally handled by the professionalized legal system in the West have been handled extralegally. Even today, many matters considered criminal in U.S. legal practice are relegated to China's public security organs, which may mete out "administrative" sanctions amounting to as much as four years of "rehabilitation through labor." See Report of the Australian Human Rights Delegation to China 14-26 July 1991, 13-14 (1991). Accordingly, the professionalizing of the criminal process does not appear to be the main reason for a limited victim role in China.

19. Hudson, *supra* note 15, at 24-25.

20. Fed. Rule Evid. 404(a).

21. Written Comments of Thomas Sullivan, Richmond County District Attorney and President of the New York State District Attorneys' Association in New York Report, *supra* note 13, at 10 app. B (Mar. 17, 1981), cited with approval in Hudson, *supra* note 15, at 24 n.10; see also Young, *supra* note 4, at 65.

22. President's Task Force, *supra* note 16, at ii.

common complaint of victims nowadays is that they are victimized twice — first by the criminal and then by the legal system.

In the U.S., proposals to redress victim wrongs are predominantly of two types: those calling for compensation, medical aid and restitution; and those aimed at securing greater and more effective participation for the victim in the criminal process.²³ The latter includes, for instance, suggestions to provide limited standing and due process rights to the victim;²⁴ offer legal assistance to victims;²⁵ cut down on postponements and expedite trials;²⁶ grant the victim the right to review a prosecutor's decision not to prosecute;²⁷ and require that the state notify the victim of the status of the case as it progresses through the judicial system.²⁸ In addition, some argue the victim should be allowed to express an opinion about negotiated pleas and make statements before and during trial as well as at sentencing.²⁹ Some have even considered giving the victim the right to initiate criminal actions and be represented by counsel.³⁰

Victims' rights advocates offer a variety of arguments in support of their cause. Some argue that a greater voice for the victim enhances the denunciatory function of criminal law, in part on the theory that allowing the victim to convey his feelings contributes to the public condemnation of crime.³¹ Further, victim participation in criminal proceedings is itself reflective of the community's response to crime: the message is that harm to others matters, and will be taken seriously in meting out punishment.³² Other commentators suggest that greater participation will promote cooperation with the police and prosecuting

23. Richard Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 *Pepp. L. Rev.* 63-4 (1984); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *Pepperdine L. Rev.* 117, 121-125 (1984) (summarizing recommendations and initiatives for better treatment of victims as witnesses and expanded role of victims in criminal process).

24. Hudson, *supra* note 15, at 36-37; Aynes, *supra* note 23, at 72-5.

25. Hudson, *supra* note 15, at 59.

26. *Id.* at 57.

27. *Id.* at 58; Aynes, *supra* note 23, at 97-107 (also advocating allowing the victim greater say in determining what crimes are investigated).

28. Gittler, *supra* note 23, at 124.

29. *Id.* at 124.

30. *Id.* at 150-76; Young, *supra* note 4, at 56-57; Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 *Miss. L.J.* 511, 558-60 (1982).

31. Howard Rubel, *Victim Participation in Sentencing Proceedings*, 28 *Crim. L.Q.* 226, 229-33 (1986).

32. Cf. Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 *Stan. L. Rev.* 1005 (1985).

authorities, resulting in better enforcement and in turn better deterrence, prevention, and ultimately justice.³³ Victims also stand to reap psychological benefits: allowing victims to voice their opinions speeds the healing process and empowers the victim, restoring a sense of control over one's life and reducing the debilitating feeling of inequality.³⁴ If nothing else, a more visible role for the victim reminds the trial judge or jury that the victim is also a real person, a unique individual with dignity and not some "faceless human cipher" or "valueless fungible."³⁵ Further, the more accurate the picture of the harm caused the victim, the more accurate the appraisal of the punishment deserved. Thus, victim impact statements and the like may be justified on retributive grounds. Indeed, some see greater attention to the victim as simply a matter of fairness. As Justice Cardozo remarked, "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."³⁶ More recently, the Supreme Court endorsed victim impact evidence as a means of offsetting the defendant's unrestricted right to introduce evidence.³⁷ Finally, a more active role for the victim may satisfy the personal and societal thirst for vengeance.³⁸

The arguments of victims' advocates have not gone unchallenged. Critics question the psychological benefits of a more victim-centered criminal proceeding. At trial, the victim is forced to relive the crime, often under the hostile attack of the defendant's counsel.³⁹ Far from

33. Goldstein, *supra* note 30, at 558; Dean Kilpatrick & Randy Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects of Psychological Functioning*, 34 Wayne L. Rev. 7 (1987); Robert Davis, *Victim/Witness Noncooperation: A Second Look at a Persistent Phenomenon*, 11 J. Crim. Just. 287, 293-298 (1983) (noting studies have shown that change in victim laws have not always lead to increased victim cooperation, but arguing that the lack of cooperation may be explained by the continuing unsympathetic treatment of victims by prosecutors).

34. D. Kilpatrick & R. Otto, *supra* note 33, at 18-28; Young, *supra* note 4, at 57.

35. *Payne v. Tennessee*, 111 S.Ct. 2597, 2615 (Souter, J., concurring opinion). See also Deborah Kelly, *Victims*, 34 Wayne L. Rev. 69-86, 76 (1987); but see Henderson, *supra* note 32, at 1005-06.

36. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

37. *Payne*, 111 S.Ct. at 2607-09.

38. But see Kelly, *supra* note 35, at 74 (studies show most crime victims are not "bloodthirsty vigilantes" bent on extracting punishment); Kelly, *Delivering Legal Services to Victims: An Evaluation and Prescription*, 9 Just. Sys. J. 62, 74-75 (1984) (studies show victims' satisfaction depends more on participation in criminal process than on whether the defendant is ultimately punished).

39. Rubel, *supra* note 31, at 238-39.

beneficial, the process may delay healing, thereby preventing the victim from coming to grips with the experience and moving on.⁴⁰ In any event, the courtroom is not the proper place for therapy, according to critics. Others fear greater disparity and arbitrariness in sentencing.⁴¹ Prosecutors are wary that they will lose control over the case.⁴² Some predict greater delays and expenses.⁴³ Still others see the victims' movement as a pawn in a political-ideological struggle: conservatives are employing the rhetoric of concern for the hapless victim to realize their true agenda of harsher punishments.⁴⁴ More philosophically, some argue that punishing on the basis of victim harm (where the harm was not intended) violates a fundamental principle of our legal system: namely, punishment is to be meted out in accordance with one's culpability — defined in terms of *mens rea*, mental states and intentions — irrespective of the unintended consequences. Far from justified on retributive grounds, heightened concern for the victim is merely a guise for a return to the uncivil practice of vengeance.⁴⁵

Many of the above arguments and proposals parallel those made by Chinese legal scholars. For instance, some commentators in China have advocated increased compensation for crime victims.⁴⁶ Others have called for the establishment of national or local victims' organizations to provide counselling and emotional support.⁴⁷ As will be shown *infra*, the present criminal law in the PRC affords the victim important procedural rights, including the right to appeal a procuratorate's decision

40. Henderson, *supra* note 32, at 964-66 and *passim*. See also Davis, *supra* note 33, at 296 (psychological difficulties of victims, who feel their situation is unique, confronting prosecutors, who do not).

41. Donald Hall, *The Role of the Victim in the Prosecution and Disposition of the Criminal Case*, 28 Vand. L. Rev. 931, 984-85 and *passim* (1975); Henderson, *supra* note 32, at 993, Booth v. Maryland, 482 U.S. 496, 503-09 (1987).

42. Robert Davis, Frances Kunreuther & Elizabeth Connick, *Expanding the Victim's Role in the Criminal Court Disposition Process: The Results of an Experiment*, 75 J. Crim. Just. 491, 504-05 (1984).

43. Goldstein, *supra* note 30, at 557 (noting concern over delay).

44. Henderson, *supra* note 32, at 945-53.

45. Cf. James Dolliver, *Victim Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 Wayne L. Rev. 87, 90 (1987).

46. Hu Chi, *Xingshi sunhai peichang fanwei ying kuada* [The Scope of Crime Victim Compensation Ought to be Expanded], 2 Faxue Zazhi 43 (1988) (scope of compensation ought to be expanded to include emotional damage); Liu Defa, *Shouharen de peichang wenti* [Problems in Crime Victim Compensation], 3 Fazhi Jianshe 53, 54 (1988) (compensate victim for medical and funeral expenses and litigation costs including travel expenses, room and board, and lost wages).

47. See, e.g., Wang Yanjun *supra* note 8, at 39.

not to prosecute and the right to make a statement at trial.⁴⁸ Nevertheless, some argue for more extensive victims' rights or for greater attention to the emotional needs of victims, including heightened protection of victims during trial.⁴⁹ Admittedly, others are wary of such proposals.⁵⁰

While similarities exist between Chinese legal scholars and their western counterparts, one must not conclude that there are no significant differences in either the arguments or the respective legal systems. Legal institutions are shaped by cultural and intellectual traditions, and the cultural and intellectual traditions of China are not those of the West. Thus one can expect to find, and does find, important differences both in the treatment of victims and the justifications for such treatment.

For instance, as noted *supra*, one theory as to why the victim has been neglected in the West is that our legal system has emphasized the rights of the defendant against the disproportionately powerful state.⁵¹ The extent to which the same rationale applies to China is debatable. China lacks a strong tradition of individual rights.⁵² That one of the primary concerns of the criminal justice system is to protect the rights of the defendant against the all-powerful state is improbable at best.⁵³

Accordingly, a brief overview of the dominant forces influencing Chinese legal institutions and thought may facilitate appreciation of relevant differences in the role of the victim in Chinese legal theory and practice.

48. See *infra* Part IV. D.

49. See Huang Mingli, *supra* note 8, at 18 (arguing victims ought to have right to appeal); Wang Yanjun, *supra* note 8, at 39 (noting that Chinese procedures fail to adequately reduce psychological and emotional stress on victims); Pei Cangling, *supra* note 8, at 19 (advocating allowing victim to bring criminal suit, petition for recusal and appeal).

50. See, e.g., Yang Shi, *Luelun zisu anjian de fanwei* [On the Scope of Private Suits], 5 *Faxue Yanjiu* 37-42 (1990) (discussing the relation, and potential conflict, between a private right of prosecution and public prosecution). See also Liu Defa, *supra* note 46, at 54 (noting prosecutors' concerns that victim compensation actions decrease efficiency of the criminal process and detract from the primary task of dealing promptly with socially dangerous elements).

51. See *supra* notes 18-19 and accompanying text.

52. See R.P. Peerenboom, *What's Wrong with Chinese Rights: Toward a Theory of Rights with Chinese Characteristics*, (forthcoming *Harv. Hum. Rts. J.* 1993).

53. For rights abuse in the Chinese criminal system since Tiananmen, see Asia Watch, *Rough Justice in Beijing: Punishing the "Black Hands" of Tiananmen Square*, Jan. 27, 1991, at 4-7. See also, Asia Watch, *Punishment Season: Human Rights in China After Martial Law*, Mar. 1990; Pear, *U.S. Report Accuses China of Grave Rights Abuses*, *N.Y. Times (Int'l)*, Feb. 4, 1990, at 13.

II. THE VICTIM IN CHINESE LEGAL THEORY

As is often the case in attempting to understand the ways of China, one must begin with Confucius.⁵⁴ The central aim of Confucius was social harmony. As is well known, Confucius sought to achieve a humane society not through publicly promulgated and impartially applied laws but through the persuasive force of exemplary moral figures guided by the *li*:⁵⁵ “Lead the people with edicts, keep them in line with penal law, and they will avoid punishments but will have no sense of shame. Lead them with virtue, keep them in line with the rites, and they will not only have a sense of shame but will order themselves harmoniously.”⁵⁶ Confucius rejected universal laws in part because such laws are too general and indiscriminate to do justice to the particularities of the immediate situation. When conflicts arise, the Confucian judge — more accurately the sage or *jun zi* — is to restore harmony by persuading the parties to accept a mutually amenable solution. The process is decidedly forward-looking. It is oriented toward rapprochement between the parties and the inculcation of values necessary to achieve and maintain a humane social order rather than toward punishment for past deeds. The focus is on attaining the highest quality of life possible through the joint efforts of humans cooperating in collective living. Hence the most important virtue in Confucianism is excellence in interpersonal relations (*ren*). As one Confucian scholar observed, “the concept of *ren* is the concept of an ideal of moral excellence. . . . The focus is on man himself and what he can morally achieve in relation to others.”⁵⁷

The Confucian approach has several implications for the victim. Given the emphasis on particularized justice, one would expect a

54. For a much fuller treatment of the philosophy and jurisprudence of Confucius, see R.P. Peerenboom, *Confucian Justice: Achieving a Humane Society*, 30 Int'l Phil. Q. 17 (1990); *Confucian Jurisprudence: Beyond Natural Law*, 18 Asian Culture 12 (1990) (discussing the philosophy of law of Confucius, Mencius and Xun Zi). See also, David Hall & Roger Ames, *Thinking Through Confucius* (1987).

55. Conventionally translated as *rituals*, *rites* or *rules of propriety*, the *li* may be understood more broadly to include the full range of social customs, mores and norms embodied in the complex relations, organizations, and institutions of society.

56. Lun Yu, 2:3. For an English version, see *Confucius: The Analects*, 2:3 (D.C. Lau trans., 5th ed. 1979).

57. A.S. Cua, *Dimensions in Moral Creativity* 68 (1978).

"Confucian" legal system⁵⁸ to be acutely sensitive to the needs and circumstances of each party, including the victim. At the very least, one would expect the victim to have ample opportunity to express his views and feelings. Further, the emphasis on social harmony and other-regarding virtues such as *ren* would suggest at minimum a need to provide as much material and nonmaterial assistance as possible, if not to "make the victim whole". Of course the chasm between theory and practice is often wide. How successfully these Confucian ideals were implemented in practice will be examined shortly.

Standing in opposition to Confucianism in the history of Chinese legal thought is Legalism. Confucius viewed publicly promulgated laws as too determinate and inflexible, thus depriving the wise ruler or judge of the discretionary latitude necessary to attain a harmonious resolution acceptable to all. In contrast, Legalists saw such laws as the means to rein in unbridled judicial caprice and corruption. In the eyes of the Legalists, the Confucian system favored the ruling noble class: "the *li* do not reach down to the common people; penal law does not reach up to the great officials."⁵⁹ The Legalists promoted codified law impartially applied to official and commoner alike as a central means of undermining an inequitable dual class system.

A rigidly enforced and well-defined system of punishments and rewards is central to Legalist theory. With rare exceptions, humans are presumed to be self-interested, rational actors.⁶⁰ By stipulating in advance (*ming*) the punishment (*xing*) for each offense, the ruler is able to manipulate the behavior of people and thereby maintain social order. To deter deviant behavior, the system imposes heavy punishments, even for light offenses.⁶¹ "In inflicting punishments, light offenses should be

58. Though suspicious of rule primarily through law, Confucius was never so naive as to completely reject any role for penal law. He realized that some individuals will not respond to moral suasion, thus necessitating punishment. But resort to penal law is dehumanizing and an acknowledgement of one's failure to achieve harmony and inspire in others other-regarding values. Hence he declares: "In hearing litigation, I am no different from any other. But if you insist on a difference, it is, perhaps, that I try to get the parties not to resort to litigation in the first place." *Analects*, supra note 56, 12:13.

59. Li Ji [Book of Rites], 135a (Taibei, 1966).

60. Han Fei Zi in Zhu Zi Yinde 204:15 (Taibei: Nanyu Press, n.d.); for an English translation, see W.K. Liao, 2 *The Complete Works of Han Fei Tzu* 44-45 (1959).

61. Shang Yang, one of the founding fathers of Legalism, not only advocated harsh punishments for minor offenses, but suggested that a ratio of nine punishments for every reward would be most conducive to public order. J.J. Duyvendak, *Book of Lord Shang* 209, 211, 242-43 (1954).

punished severely. If light offenses do not appear, heavy offense will not come. This is called abolishing punishments by means of punishments."⁶²

The punishment-centered Legalist system is considerably less hospitable to victims than its Confucian counterpart. The focus of the judge is on the crime and the corresponding punishment, not the victim (and indeed not even the criminal). Moreover, the ultimate purpose of the Legalist system is arguably to serve and protect the interests and power of the state and, more specifically, the ruler. In the words of one scholar, "Legalist political philosophy might be described as 'government of the ruler, by the ruler, and for the ruler.'" ⁶³ Though perhaps overstated,⁶⁴ there is more than a kernel of truth in this observation. Unless moderated by the humanizing virtues of Confucianism, Legalism no doubt can be harsh medicine. Historically, Legalism did in fact come to serve the despotic rule of the Qin regime. In any event, that the Legalist system even tends to serve the state and ruler rather than justice bodes ill for the victim. If not completely shunted aside, at minimum the victim finds his claims and needs subordinated to state interests.

Chinese legal history is often portrayed as a struggle between Confucians and Legalists. Much is made of the Confucianization of the law, which began in the Han (after the fall of the Legalist Qin regime) and continued through the Qing.⁶⁵ Yet scholars have also noted another phenomenon: the naturalization of the law.⁶⁶ The naturalization phenomenon is responsible for a most peculiar and distinctive theory, namely, the notion of cosmic harmony so popular among western commentators. In the words of two of its more renowned champions: "In the final analysis, a disturbance of the social order really meant, in Chinese thinking, a violation of the total cosmic order because, according to the Chinese world-view, the spheres of man and nature were inextricably interwoven to form an unbroken continuum."⁶⁷ Thus once a criminal act or even a mere violation of the moral order occurred, "the restoration of social harmony [and hence cosmic

62. Han Fei Zi, *supra* note 60, at 365:1; Liao, *supra* note 60, at 2:325.

63. Roger Ames, *Art of Rulership* 50 (1983).

64. For the argument that Han Fei intended law to serve the people as well as the ruler, see *Law and Morality*, *supra* note 10, ch. V.

65. See Chu T'ung Tsu, *Law and Society in Traditional China* (1965).

66. See *supra* note 10.

67. Bodde & Morris, *supra* note 10, at 4.

harmony] required that punishment be inflicted to exact retribution from their doer."⁶⁸

Sinologists have long wondered who was responsible for this naturalization process. As Bodde and Morris point out, such a concept could not have arisen from early Confucians because "law to them was itself a violation of the social order. Nor could it have started with the Legalists, since these men used law quite consciously to destroy and remake the old social order."⁶⁹ Classical Daoists, although interested in harmony of and with the natural order, rejected codified law as a means to effect social order.⁷⁰

The 1973 discovery of the *Huang-Lao Boshu* (Silk Manuscripts of Huang-Lao) provides a key piece to the puzzle. The *Boshu* is the only extant text of the Huang-Lao school, which dominated court ideology during the early years of the Han. As a philosophy, Huang-Lao is a synthesis of Daoist, Legalist and Confucian ideas. Like Legalism, Huang-Lao stresses the central role of law in attaining social order. But whereas Legalism espouses rule by positive law, Huang-Lao advocates rule of natural law. Law is grounded in a predetermined natural order.⁷¹ Indeed, the first line of the text is: "dao (the cosmic natural order) gives rise to laws" (*dao sheng fa*).⁷²

Like law, punishments too must correspond to the natural order. For instance, spring and summer are times of life, autumn and winter times of death and decay. Thus the state must punish and execute criminals only during the times of natural death and decay — autumn and winter.⁷³ Further, punishments must "hit the mark" (*dang*). If they do not fit the crime, one violates the natural order, further disrupting cosmic harmony, and calamity is sure to redound on the ruler.⁷⁴

68. Id.

69. Id. at 43.

70. The usual answer has been that the process began with Zou Yan and the naturalists of the Jixia Academy, who then influenced New Text Confucians such as Dong Zhongshu. When Han Wu Di turned to Dong Zhongshu and the New Text Confucians in the early Han, naturalist ideas began to work their way into the law. See, e.g., Bodde & Morris, *supra* note 10, at 43-44.

71. There is a unity of human and nature (*tian ren he yi*) in the Huang-Lao world. The cosmic natural order (*dao*) embraces both the way of humans (*ren dao*) and that of non-human nature (*tian dao*). See Mawangdui Hanmu Boshu, 49:29a, 71:116b, 76:132a (1980) [hereinafter *Boshu*]. Citations are of the form — page number of the 1980 edition:line number of original text.

72. *Boshu*, *supra* note 71, at 43:1a.

73. Id. at 45:9a; 62:85b.

74. Id. at 45:9b.

Punishments must not only be reliable and impartial;⁷⁵ they must also be certain.⁷⁶ Unlike Confucianism, Huang-Lao demands that the guilty be executed without pardon.⁷⁷ At the same time, Huang-Lao distinguishes itself from Legalism in calling for compassion and benevolence to complement punishment. The ruler should rely on both strength and moral virtue and offset punishment with liberal rewards.⁷⁸ Huang-Lao believes, like Confucianism, that ultimately society is better served by developing a sense of shame in the people so that punishments are not needed.⁷⁹ Indeed, an ideal ruler would not even need punishments.⁸⁰

The *Boshu* is a philosophical treatise, not a casebook. To the extent it touches on crimes, it does so from the standpoint of a penologist. Nevertheless, the emphasis on fitting the punishment to the crime, rather than the criminal, is readily apparent. Though this suggests that the victim is not of primary concern, the incorporation of Confucian humanitarian values indicates that the victim is not to be completely forsaken.

More generally, certain inferences can be drawn about the role of the victim in a "naturalized" legal system that takes cosmic harmony as its goal. Most important for present purposes, one would expect that the victim would be of utmost importance to cosmic harmony. How can cosmic harmony be restored if the victim is left to shoulder the financial, emotional and psychological burden of the crime? Hence the treatment of the victim is one test of whether the cosmic harmony theory does indeed survive the Han as a philosophical basis for the penal system of later dynasties. As we shall see, the formal legal system showed relatively little concern for the plight of the victim, suggesting that the theory of cosmic harmony is not as important as many believe.⁸¹

The most recent intellectual influence on Chinese legal theory is Marxist-Leninism. The communist ideal is that the state will wither

75. Id. at 45: 21a.

76. Id. at 47:18b.

77. Id. at 47:16b.

78. Id. at 69:108b.

79. Id. at 47:20a.

80. Id. at 83:161a.

81. Of course alternative explanations are possible. For instance, the problem might simply be the perennial difficulty of translating theory into practice. Or one might conclude that cosmic harmony involves only the state, the criminal and the crime, though this seems peculiar.

away and law not be needed. One must do away with private property, which leads to class conflict and "the struggle of the isolated individual against the relationship of dominance."⁸² Once the causal conditions of crime are eliminated, harmony will prevail. A new socialist human being will be created, more other-regarding than her self-interested capitalist ancestor. In the meantime, however, law is to be used as a tool to serve political ends: "Law is a political instrument. It is politics."⁸³ Echoing these words of Lenin, Mao described law and courts as "instruments with which one class oppresses another. As far as the hostile classes are concerned these are instruments of oppression. They are violent and certainly not 'benevolent things.'"⁸⁴

Though law may be a tool, it is not a sledgehammer to be wielded indiscriminately. Mao distinguished two contradictions: contradictions between the people and the enemy; and contradictions between the people themselves.⁸⁵ Severe sanctions and dictatorial methods were to be employed in dealing with one's enemies: "reactionaries, exploiters, counterrevolutionaries, landlords, bureaucrat-capitalists, robbers, swindlers, murderers, arsonists, hooligans, and other scoundrels who disrupt social order."⁸⁶ Conflicts among the people were to be handled through democratic means, namely, education and persuasion. Formal legal punishment was a last resort, meted out only if one proved resistant to persuasion and rehabilitation.⁸⁷

Given the humanitarian values of socialism, one would expect a legal system favorably disposed toward the victim, at least victims who are not enemies of the people. The extent to which practice has matched reality is taken up in Part IV.

82. Karl Marx, *The German Ideology*, cited in Jerome Cohen, *The Criminal Process of the People's Republic of China, 1949-1963*, at 75 (1968).

83. John Hazard, *Communists and Their Law* 69 (1969) (quoting Lenin).

84. Mao Zedong, *On People's Democratic Dictatorship* 16-17 (1951). The similarities of socialist and Confucian ideals are worth noting: in both systems, law is at best a necessary evil; further, through persuasion and education, humans can be molded to be more other-regarding, eventually leading to a harmonious, self-regulating society where individuals are able to realize their full potential as unique human beings.

85. Mao Zedong, *On the Correct Handling of Contradictions Among the People*, in 5 *Selected Works of Mao Tsetung* 391 (1977).

86. *Id.* at 393.

87. In practice, the formal legal system continued to be supplemented by informal mechanisms aimed at education, conciliation and ultimately harmony. Shao-Chuan Leng & Hungdah Chiu, *Criminal Justice in Post-Mao China* 24-25 (1985); Victor Li, *Law Without Lawyers* 41-67 (1978); Cohen, *supra* note 82, at 96-199.

III. THE PREMODERN CHINESE LEGAL SYSTEM

As noted previously, victims' rights movements have generally concentrated their energies on attaining restitution and procedural rights for victims. However, a legal system demonstrates concern for the victim in other ways as well. One indicator of how seriously the victim is taken is the extent to which punishment is a function of victim harm.

A. *Victim Harm*

All legal systems consider victim harm to some extent in grading punishment. The Chinese system is no exception. Since the Qin, punishment for theft or robbery has been calibrated according to the value of the goods stolen.⁸⁸ Similarly, personal injury, a more serious harm than property damage, is punished more heavily.⁸⁹ And all else being equal,⁹⁰ murder is punished more severely than personal injury. In the Tang, for instance, robbery was punished according to value. But if the criminal injured another in the process, he was strangled to death. Were one so unfortunate as to kill someone, he was given the even harsher punishment of decapitation.⁹¹ Though such grading is normal, what is surprising about the Chinese system is the complexity and precision of the punishment-harm calculus. To take just one example, one's punishment differs depending on how many of the victim's fingers one breaks.⁹²

More illuminating than the simple fact of grading according to victim harm are the kinds of harm considered relevant. For instance, the U.S. Supreme Court recently endorsed sentencing on the basis of the personal characteristics of the victim and the impact of the crime on the victim's family.⁹³ For its part, the Chinese legal system has always recognized the special status of the family. Accordingly, the law

88. For the Qin, see A.F.P. Hulsewe, *Remnants of Ch'in Law* 8-9 (1985); for the Tang, see Gu Tang Lu Shuyi [Tang Code and Commentaries], art. 137 [hereinafter Tang Code]. For an English translation, see Wallace Johnson, 1 *The T'ang Code* 127 n.1 (1979).

89. See, e.g., Hulsewe, *supra* note 88, at 141 (D65-66).

90. Harm is not the only factor. Chinese legal systems also take into consideration the status of the offender and victim and the mens rea of the actor. See *infra* Parts III.B and IV.B.

91. Tang Code, *supra* note 88, arts. 137, 181; Johnson, *supra* note 88, at 127 n.1, 208 n.24. For the Qing, see Bodde & Morris, *supra* note 10, at 293-94.

92. Tang Code, *supra* note 88, art. 45; Johnson, *supra* note 88, at 237.

93. Payne, 111 S. Ct. 2597 (1991).

permitted concealment of a family member's crimes,⁹⁴ a position that can be traced back to Confucius and beyond.⁹⁵ Further, the punishment of an only son could be reduced to allow him to look after his parents. The legal system also showed deference to the family by grading intrafamily offenses according to the relative status of the parties.⁹⁶ But the system does not seem particularly concerned with the effect of a crime on the *victim's* family.⁹⁷ The emotional and psychological impact of the crime is not part of the explicit punishment calculus. This is perhaps somewhat surprising, given the detail with which punishment is calibrated to harm.

As noted above, economic harm to the victim is central to the degree of punishment. But to view this as conclusive evidence of a victim-oriented legal system would be premature. The system punishes economic harm to the state much more heavily than comparable harm to private parties, suggesting that the interests of the state are of greater weight than those of individual victims.⁹⁸ Further, while restitution to the victim is part of the punishment for theft or property damage, the criminal in many instances is relieved of this financial burden — though the state still extracts its fee by imposing some form of punishment on the offender.⁹⁹

Similarly, although personal injury and death are punished particularly harshly, one cannot conclude that this is motivated by concern for the victim. The state undoubtedly intended the heavy punishments to deter such crimes, a benefit to both potential victims and society at large. But there may be other reasons why personal injury and homicide are punished so severely. Bodde and Morris, for instance, advance the requital theory to explain the harsh punishments for killing. On their cosmic harmony view, killing is a violation of the cosmic order. The requital theory holds that order can be restored only by offsetting the crime with the same kind of punishment: the taking of a life must be paid for with a life. What is essential is that a life be taken, not that the life be that of the criminal who commits the homicide. Thus,

94. This privilege does not extend to crimes that threaten the State such as treason. See MacCormack, *supra* note 10, at 165-66.

95. *Analects*, *supra* note 56, 13:18; see also MacCormack, *supra* note 10, at 162.

96. See *infra* Part III.B.

97. There is one notable exception: the killing of three members of one family is one of the ten great offenses. See Johnson, *supra* note 88, at 19; MacCormack, *supra* note 10, at 179.

98. See, e.g., Bodde & Morris, *supra* note 10, at 249.

99. See *infra* notes 137-71 and accompanying text.

if one's coconspirator dies in prison, his life will cancel out the homicide, and one's punishment will be reduced from execution to life exile.¹⁰⁰ The primary focus is on the crime, not the criminal, and surely not the victim. As Bodde and Morris observe, "little importance attaches to the agent and his victim, considered as individuals."¹⁰¹

The requital theory is not without problems. For starters, one would think that to restore cosmic balance one would have to bring the loser back to status quo ante.¹⁰² Although the victim cannot be brought back to life, his family can be compensated, a practice that occurs only irregularly.¹⁰³ Further, the requital theory is limited to capital punishment. Other crimes may invoke punishments wholly different in kind from the underlying offense. The theory even fails in many instances involving killing. The punishment for accidental homicide is not death but a mere fine. Should two people be killed, only one offender need die to balance the scales.¹⁰⁴ Status relationships also destroy the symmetry. Within the family, a father who killed his son often received only a light penalty, and if the son was disobedient, he might not be punished at all.¹⁰⁵ A husband was allowed to kill his wife and lover on the spot with impunity.¹⁰⁶ And in the Tang, when a slave killed another slave, the punishment was not necessarily death. The master could request a one degree reduction because "slaves are an inferior class; the Code considers them to be domestic animals."¹⁰⁷ In practice, moreover, the death sentence was often reduced either upon review or by amnesty.

An alternative explanation for the harsh penalties meted out for personal injury and homicide is that such crimes undermine the Confucian system. The Confucian approach to social order is predicated on persuasion, not force. Disputes are handled outside the courts through informal mediation. To be successful, certain conditions must

100. Bodde & Morris, *supra* note 10, at 182.

101. *Id.* at 184 n.22.

102. Indeed, one is hardpressed to reconcile the privilege of concealment extended to family members with cosmic harmony. Concealment prevents apprehension of the offender, thus thwarting the state's efforts to restore harmony. Perhaps one could argue that family harmony is more important than cosmic harmony.

103. See *infra* notes 147-82 and accompanying text.

104. Bodde & Morris, *supra* note 10, at 332.

105. Chu, *supra* note 65, at 24. In the Qin, infanticide was permitted if the child was born unhealthy. See Hulsewe, *supra* note 88, at 139 (D56).

106. M.J. Meijer, *Murder and Adultery in Late Imperial China* 39-40 (1991).

107. Tang Code, *supra* note 88, art. 47; Johnson, *supra* note 88, at 251.

be met. First, one must be amenable to persuasion, willing to engage in discussion and, if necessary, to compromise. Second, disputes must be nipped in the bud. If the situation has already deteriorated to the point of violence, the parties no doubt will be hostile toward each other. They most likely will be less willing to listen to reason and to compromise.

The state imposes harsh penalties in part because it benefits from the Confucian method of dispute resolution. If matters are settled informally through mediation, the state does not incur the expense of a formal legal proceeding. Thus the state's interest lies in discouraging litigation, accomplished historically by sentencing pettifoggers and ambulance chasers to three years of penal servitude.¹⁰³ In addition to cost savings, however, the state may prefer the Confucian approach on the higher ground that moral persuasion changes character, whereas the law merely alters behavior. In any event, violence and killing constitute a rejection of the Confucian mediation process. Once they occur, the state is forced to intervene.

In addition to personal injury and homicide, one offense taken particularly seriously is false accusation. The Chinese criminal process relied heavily on confession, often extracted through torture. If the accused did not "confess" even at pain of physical torture, the accuser was then subject to the same interrogation techniques. If found to have made a false accusation, the accuser was punished according to the charges he himself had brought.¹⁰⁹ No doubt there are many reasons why false accusations are taken so seriously. One reason is the desire to punish only the guilty. Perhaps more importantly, however, false (and anonymous) accusations undermine both the formal and informal processes. Such accusations evidence an unwillingness to seek conciliation. The informal avenues of mediation are bypassed, and the state is forced to get involved in what are often essentially private disputes. Indeed, the state may feel particularly put upon in that the accuser is using the state and the legal machinery to satisfy a personal grudge.¹¹⁰

For present purposes, the main lesson to be drawn is that the grading of offenses in terms of victim harm, and the specific types of victim harm singled out for harsh treatment, do not necessarily reflect a legal system particularly concerned with the victim.

108. See Bodde & Morris, *supra* note 10, at 413.

109. See, e.g., the Tang Code, *supra* note 88, arts. 478, 342; Johnson, *supra* note 88, at 15.

110. Bodde & Morris, *supra* note 10, at 400.

B. Victim Status

One of the most distinctive features of the Chinese legal system is the importance attached to the status of the parties. What the punishment will be, and indeed whether there will even be punishment, depends on the status of both the offender and the victim. Particular attention is paid to the victim's family position, gender, race, age, religion, moral character and social status.¹¹¹

Within the family, two distinctions are important: that between senior and junior; and that between male and female (husband and wife, the patriarchal and matriarchal lines).¹¹² For instance, if the son strikes his father, he is put to death. If the father beats his son, he is not punished.¹¹³ In terms of the husband-wife relationship, the husband is the senior, the wife the junior, with punishment doled out accordingly.¹¹⁴ Likewise, the wife is considered the junior *vis-a-vis* her parents-in-law, with her status comparable to a child or grandchild.¹¹⁵

Outside the family context, gender remained a factor in fixing punishment. On the whole, females were treated more leniently than

111. Such factors play a role in practice in the U.S. today. See Hall, *supra* note 41, at 939-42 (victim's "dirty hands," race, social status and the relation of the victim to the offender are all instrumental at various levels of the criminal process, particularly the early stages involving police, investigators and prosecutors).

112. See Chu, *supra* note 65, at 41-78.

113. Even the supposedly Legalist and nonclass Qin recognized the relevance of status within the family. The father was permitted to kill or mutilate his son, the master his slave, as long as he first petitioned for approval. If he did so without authorization, he would be sentenced to penal servitude and tattooed (unless the child was adopted, in which case he received capital punishment because an adopted child is not part of family in same way). Conversely, if a junior beat a senior, the punishment was penal servitude and a tattoo. Hulsewe, *supra* note 88, at 8. Similar rules applied in the Tang, see the Tang Code, *supra* note 88, arts. 253, 256; Johnson, *supra* note 88, at 21, 31-3, and in the Qing, see Bodde & Morris, *supra* note 10, at 385-89, 409.

114. See Chu, *supra* note 65, at 102-10. In the Qin, if the husband beat his wife, tore her ear, broke a limb or dislocated a joint, he was only given the light punishment of having his beard shaved. Hulsewe, *supra* note 88, at 141 (D64). In the Tang, whereas the wife suffered one year penal servitude for hitting her husband, the husband was not punished for beating his wife. Tang Code, *supra* note 88, art. 326; Johnson, *supra* note 88, at 22, 33. As a benchmark for comparison, ordinary assault of a neutral person brought forty blows with light stick. Tang Code, *supra* note 88, art. 202; Johnson, *supra* note 88, at 21. For the Qing, see Bodde & Morris, *supra* note 10, at 384 (husband beats wife) and Le P. Guy Boulais, *Manuel du Code Chinois 1400-1408* (Shanghai, 1924) (wife beats husband). Cites to Boulais are to the section number rather than the page.

115. See Chu, *supra* note 65, at 111-117.

males. For instance, in the Tang, women were not exiled for life,¹¹⁶ and in the Qing, they generally were allowed to redeem punishments of exile and penal servitude.¹¹⁷ Yet although the gender of the *criminal* is clearly relevant, the relevancy of the *victim's* gender outside the marriage context is less apparent. Of course some crimes, such as rape, are primarily concerned with female victims. Further, judges may have taken gender into account when exercising sentencing discretion. But by and large the codes did not differentiate between male and female victims in assigning punishment.¹¹⁸

Of greater importance was one's social status.¹¹⁹ Officials were treated more favorably than commoners. They could not be arrested, investigated or sentenced without permission of the emperor. Some were exempt from torture for certain crimes. All benefitted from sentence reductions, and could redeem certain punishments either by paying a fine or accepting a demotion.¹²⁰ Status was also important for the official *qua* victim.¹²¹ Generally speaking, the higher the status of the victim and the lower the status of the offender, the more severe the punishment.¹²² Thus a plot to kill one's superior in government was punished by life exile, whereas a plot to kill an ordinary person resulted in penal servitude.¹²³

A second social distinction is between free person and slave.¹²⁴ Slaves and members of the inferior class were punished more severely for killing, injuring, marrying or engaging in illicit sex with a free person or member of a superior class than the contrary.¹²⁵ In the

116. Tang Code, *supra* note 88, art. 28; Johnson, *supra* note 88, at 30. Women were exiled, however, in cases involving collective responsibility.

117. Bodde & Morris, *supra* note 10, at 316, 227-28, 255.

118. For example, in the Qin the punishment for tearing a woman's ear was the same as for tearing a man's. Hulsewe, *supra* note 88, at 141 (D65).

119. The following discussion draws on Chu, *supra* note 65, at 177-85.

120. Hulsewe, *supra* note 10, at 214-15.

121. In the Han, crimes against the emperor or other officials were often classified as insubordination (*bu jing*) or improper (*bu dao*). *Id.* at 156-196.

122. See Chu, *supra* note 65, at 183. See also Johnson, *supra* note 88, at 21, 32; Bodde & Morris, *supra* note 10, at 397-99.

123. Tang Code, *supra* note 88, arts. 252, 256; Johnson, *supra* note 88, at 21.

124. Actually, the inferior class—*jien min*—encompassed personal retainers, bondspersons, and slaves, with slaves the lowest in status. Johnson, *supra* note 88, at 28; Chu, *supra* note 65, at 186-200. Slaves were even lower in status than concubines. *Id.* at 123-27.

125. In the Qin, a master merely needed to ask permission to kill a slave. Slaves, on the other hand, were prohibited from denouncing their superiors. Hulsewe, *supra* note 88, at 139 (D56-57), 148-49 (D86-7).

Tang, offenses against slaves by commoners were punished two degrees less severely than similar offenses against another commoner. Conversely, offenses by a slave against a commoner were punished two degrees more.¹²⁶ In the Qing, if a free person injured a slave, he was punished one degree less than if had injured a free person; if he killed a slave, he was subject to strangulation after the assizes, whereas had he killed a free person, he would be subject to decapitation after the assizes.¹²⁷

The religious status of the parties also influenced punishment. In the Tang, the master-disciple relation for Buddhists and Daoists was equivalent to the family relationship pertaining between relatives of the third degree of mourning.¹²⁸ Thus a disciple who struck his master was punished more severely than the monk who beat his disciple. The codes even singled out for special treatment damage to or theft of religious objects such as Buddhist or Daoist statues.

Immutable characteristics such as race also entered into the punishment calculus. The Yuan legal system favored the Mongols. If a Chinese fought back against a Mongol, he would lose the right of appeal and be punished.¹²⁹ A Mongol who killed a Chinese was sentenced service in the military rather than death. In addition, he was required to pay funeral expenses to the victim's family.¹³⁰ Qing law privileged the Manchus, particularly the bannermen.¹³¹ Again, however, the emphasis was primarily on the status of the criminal, not the victim.

Another relevant personal characteristic was age, both of the criminal and the victim. The Chinese legal system, like most other systems, has special provisions for minors. Some provisions hold the offender strictly liable with respect to the age of the victim. For instance, in the Tang, the consent of a child less than ten years old was no defense to a kidnapping charge.¹³² And the murder of a child less

126. Johnson, *supra* note 88, at 28. A master who killed a slave who had done nothing wrong was given one year penal servitude. Tang Code, *supra* note 88, art. 321.

127. Bodde & Morris, *supra* note 10, at 374.

128. Tang Code, *supra* note 88, art. 23, Johnson, *supra* note 88, at 32, 146. For the Qing, see Bodde & Morris, *supra* note 10, at 366-68; Boulais, *supra* note 114, 1375-1379. Being a Buddhist or Daoist monk could also subject one to higher penalties. See Bodde & Morris, *supra* note 10, at 434; Boulais, *supra* note 114, 1626.

129. See Chu, *supra* note 65, at 204.

130. *Id.* at 204.

131. *Id.* at 204-06.

132. Subcommentary to art. 18 of the Tang Code, *supra* note 88; Johnson, *supra* note 88, at 121.

than ten resulted in beheading without delay, as opposed to decapitation subject to review.¹³³

On the other end of the spectrum, old age was statutorily significant with respect to the criminal, entitling the offender to lenient treatment. But the advanced age of the victim (outside the family context) does not appear to have been a statutory element in setting punishment, though again, as with gender, it may have played a role in influencing the judge in the exercise of sentencing discretion.¹³⁴

An important factor both statutorily and in practice was the moral character of the victim. Under certain conditions, the killing of a "scoundrel" was not a capital offense.¹³⁵ And one who killed a coconspirator guilty of a capital crime was pardoned.¹³⁶ Conversely, an unrepentant robber who killed an accomplice who had turned state's evidence was subject to increased penalties. And as noted previously, to kill a slave free from wrong-doing was more serious than killing a rebellious slave. Similarly, to kill a disobedient son or a shameless wife was more serious than killing a filial son or virtuous spouse.

One might wonder what happens when moral character and status point in opposite directions. Two cases involving blind but morally blameworthy victims suggest that status trumps character. In the first, that the victim was blind and hence of protected status outweighed the fact that he was of inferior moral character, having shamelessly tolerated his wife's adultery.¹³⁷ In the second, a minor killed a blind man. Despite the defendant's age and the fact that he had been insulted and abused by the victim, the Board of Punishments denied clemency.¹³⁸

The emphasis on the status of the parties is striking to the contemporary westerner brought up on a steady diet of formal equality

133. Meijer, *supra* note 106, at 21. Boatcaptains and innkeepers were also subject to severe treatment for the injury or death of passengers and guests, the theory being that passengers and guests — like children — were vulnerable. *Id.* at 29-30.

134. This may be particularly true in cases where the offender was to have otherwise been treated leniently because of privileged status. See Bodde & Morris, *supra* note 10, at 299-300.

135. *Id.* at 443.

136. Tang Code, *supra* note 88, art. 38, commentary and subcommentary; Johnson, *supra* note 88, at 210.

137. Jonathan Ocko, paper presented at Columbia Modern China Seminar, (Feb. 13, 1992) (citing *Qiushe tiaokuan* 2.70).

138. Derk Bodde, Age, Youth, and Infirmary in the Law of Ch'ing China, in *Essays on China's Legal Tradition* 157 (Jerome Cohen et al. eds., 1980).

before the law. At least in theory, the average citizen is the President's equal in the eyes of the law, albeit with a few exceptions.¹³⁹

The cost of formal equality, however, is a thin view of the particular individual. One murder victim is interchangeable with the next. Each becomes, in the words of Justice Souter, "valueless fungibles," "faceless human ciphers."¹⁴⁰ By focusing on the particular relationships of the parties, the Chinese system arguably aims for a thicker justice. In the eyes of Chinese law, each person is a multifaceted composite defined by a nexus of social roles. A father may be senior with respect to his son, but he is junior with respect to his father. Accordingly, to attempt to define one's duties and rights in a vacuum is sheer folly. In a Confucian world, one's particular normative, legal and social obligations are inextricably tied up with one's interpersonal relations and social roles. Blind justice is therefore no justice at all. If real justice is to be achieved, the legal system must recognize the fullness of human reality. An ideal system would take full cognizance of the richness of the human condition, considering each person in light of his or her complex historical matrix of social, political, legal, economic, racial, religious and gender relations.¹⁴¹

The distinction between a role-sensitive legal system and contemporary western systems should not be overstated. Not all western theorists privilege formal equality.¹⁴² Further, U.S. law draws distinctions between individuals both in theory and practice.¹⁴³ Indeed, if a recent Supreme Court decision is any guide, the legal system will be increasingly concerned with the personal characteristics and family

139. For instance, federal law authorizes the death penalty for assassination of the President. 18 U.S.C. §§ 1751, 1111.

140. Payne, 111 S. Ct. at 2615.

141. For a contemporary defense of status, see Chen Xingliang, *Lun shenfen zai dingzui liangxing zhong de yiyi* [On the Meaning of Status in the Crime Definition and Sentencing], 6 *Faxue Yanjiu* 69-73 (1986).

142. Most notably, formal equality has been attacked by some critical race theorists and those who favor affirmative action policies to redress historical substantive inequalities. For a sensitive critique of the "New Right" emphasis of formal equality and of the rejection of rights by some Critical Legal Studies scholars, see Kimberley Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 *Harv. L. Rev.* 1331 (1988).

143. See *supra* note 139. See also Kelly, *supra* note 35, at 75 n.30 ("Scrutiny of victims pervades the judicial process. The identity of the victim is often a major factor in the decision to proceed with an arrest or prosecution. . . . Studies have shown that the lower the prestige of the victim, the more likely that the case will be dismissed. . . . [V]iolent crimes involving low status people and high status victims are taken more seriously. Female victims have the highest possibility that their case will be rejected. . . .").

status of the victim.¹⁴⁴ Conversely, some schools of Chinese thought, most notably Legalism, called for equality before the law.¹⁴⁵

The real issue is perhaps not whether the law should recognize distinctions, but rather which distinctions. Should the race of the victim matter? religion? gender? social status? moral character? political background — worker, peasant, soldier, capitalist? And should such characteristics matter in all circumstances or only some?

That the premodern Chinese system privileged the characteristics it did reveals much about the values of Chinese society. The importance of family is noteworthy, as is the respect for the elderly. The low status of women and the oppressed conditions of slaves and servants are also apparent. But for all the attention to the status of the victim, the system does not appear to be particularly victim-oriented. One reason for this is that the system is geared toward punishment. Even when victim status does play a role, its primary purpose is to determine the degree of punishment for the criminal. The criminal, not the victim, remains the focal point. That is not to say punishment is the sole end of the legal system. Education, denunciation, and rehabilitation are also important goals. But these goals do not directly respond to the needs of the victim (though there may be a longterm “trickle down” effect). Of more immediate concern to the victim are compensation, procedural rights, and a greater role in the criminal process.

C. *Victim Compensation*

The initial goal of the victims’ right movement in the U.S. was to secure compensation for the victim. Most states have now enacted legislation providing for restitution, medical aid, or other forms of financial assistance.¹⁴⁶ On the Chinese side, victim compensation provisions have been included in legal codes for over a millennium.

From the Tang to the Qing, although monetary redemption was not permitted for capital crimes, accidental homicide could be redeemed

144. Payne, 111 S. Ct. 2597 (1991) (“victim impact evidence” relating to personal characteristics of victim and impact of crime on victim’s family not per se inadmissible).

145. The Legalists were not alone in this regard. Huang-Lao also advocated publicly promulgated laws impartially to all. Indeed, it went one step beyond Legalism in insisting that the ruler also obey the law. Boshu, *supra* note 71, at 43:1b. On the ethical front, the Mohists rejected the Confucian notion of graded obligations, espousing a universal ethics in which one’s parents were to be treated no better or worse than any other.

146. See Carrington & Nicholson, *supra* note 1.

through payment to the family of a fixed sum of money: for example, in the Qing, 12.42 oz. of silver was sufficient.¹⁴⁷ In the Yuan, one convicted of homicide was required to pay funeral expenses to the family of the victim in addition to suffering other punishment. The standard amount was 50 taels of silver. Those who could not afford to pay were required to provide personal service or to assign a family member to the victim's family as a slave.¹⁴⁸

In later dynasties, the practice with respect to nonaccidental homicide is less clear. One scholar contends that an offender was obligated to supply funeral and nourishment expenses to the family of the victim in the Ming and Qing.¹⁴⁹ Noting conflicting practices and confusion, however, a Qing appellate court explicitly addressed the issue of the types of homicides requiring payment of funeral expenses. The court concluded that defendants must pay when the underlying offense was punishable by death but the sentence was reduced because of mitigating circumstances. If the defendant committed a homicide for which the maximum sentence was penal servitude or less, however, he was not required to pay funeral expenses.¹⁵⁰ For example, if a fight resulted in serious injury and the victim died within the statutorily defined healing period (50 days), then the offender would be subject to death. If he received a reduced sentence, he would be required to pay funeral expenses. If on the other hand, the victim died not during the 50 day healing period but during the following supplementary 20 day period, then the maximum sentence would be three years penal servitude. Hence the victim would not be required to pay funeral expenses.

Bodde and Morris provide the following summary:

147. See Chu, *supra* note 65, at 56; for the Tang, see Tang Code, *supra* note 88, art. 339. In keeping with the aforementioned emphasis on status, accidental killing of parents or grandparents or senior relatives could not be redeemed. Chu, *supra* note 65, at 56. The punishment in the Tang in such cases was exile to 3000 *li* for life. Tang Code, *supra* note 88, art. 329.

Though the amount is generally 12.42 oz. of silver, in at least one case the court asks for 20 oz. See Bodde & Morris, *supra* note 10, at 338. In another, the defendant caused death by beating the victim in an illegal manner. In addition to receiving 100 blows of the heavy bamboo and three years of penal servitude, he was required to pay 10 oz. of silver to the victim's family. *Id.* at 459.

148. Paul Heng-chao Ch'en, *Chinese Legal Tradition Under the Mongols* 52-53 (1979).

149. MacCormack, *supra* note 10, at 18, 192.

150. Bodde & Morris, *supra* note 10, at 340.

(1) no payment of funeral expenses if the offender's homicide is of a sort for which he is actually executed; (2) payment to be made if the homicide is of a sort for which, under special circumstances, the normal death penalty is legally reducible to life exile [such special circumstances include imperial amnesty, a son murders to rescue parents, a principal or accomplice dies in jail, and so on]; (3) no payment if the homicide is of a sort which, from the very beginning, is punishable by less than a death penalty.¹⁵¹

There are some statutorily defined exceptions to category (3). That is, statutes require payment in some instances even though the crime does not merit the death penalty.¹⁵² As Bodde and Morris point out, however, it is presumably precisely because they constitute an exception to the general rule that they are explicitly stated in the statutes.

In practice, the victim's family had various means to extort money from the defendant and his family. One magistrate described how victims' families would deliberately delay the investigation, knowing that the suspects would be jailed — and hence subject not only to the harsh conditions of prison but the cruelty and extortion of jailers. Such delays often forced the defendant's family to offer money to the victim's family.¹⁵³

Under certain circumstances, the victim also received compensation for personal injury. In the Tang, accidental infliction of injury was redeemable with copper.¹⁵⁴ Some nonaccidental injury may also have been redeemable by payment of copper to the victim.¹⁵⁵ Redemption was not permitted where one intentionally beat and thereby disabled the victim.¹⁵⁶ If a slave, retainer or bondsperson could not afford redemption, beating was substituted.¹⁵⁷ If such persons were old, young or disabled, they would not be beaten, but were simply exempted from punishment.¹⁵⁸ In the Yuan, one who injured another had to

151. Bodde and Morris, *supra* note 10, at 341.

152. Boulais, *supra* note 114, at 154, 1285-86, 1312-13, 1316, 1319, cited in Bodde & Morris, *supra* note 10, at 339.

153. Huang Liuhong, *A Complete Book Concerning Happiness and Benevolence* 320-322 (Djang Chu trans., 1984).

154. Tang Code, *supra* note 88, art. 339; MacCormack, *supra* note 10, at 196.

155. Johnson, *supra* note 88, at 55 n.45; but see MacCormack, *supra* note 10, at 129 n.39.

156. Tang Code, *supra* note 88, art. 11; Johnson, *supra* note 88, at 97.

157. Tang Code, *supra* note 88, art. 47; Johnson, *supra* note 88, at 250-51.

158. *Id.*

supply "nourishment expenses" in addition to receiving other punishment.¹⁵⁹ In the Ming and Qing, the defendant was obliged to give property to the victim in cases of serious injury.¹⁶⁰

Though victim compensation was formally proscribed in some instances, the Chinese legal system differs from other ancient systems in that Chinese codes generally assigned physical punishment, not monetary value, to personal injury.¹⁶¹ Further, even where compensation was stipulated, actual collection was another matter. To enforce one's claims, the victim had to rely on the notoriously corrupt staff of the magistrate.¹⁶²

In addition to compensation for personal injury, victims of robbery, theft or extortion generally were entitled to restitution. The criminal was also punished.¹⁶³ Interestingly, the Tang code provides that in cases of extortion or theft, the defendant must give back the goods, but if the defendant is guilty of robbery (i.e. theft with the threat of force), he must pay double value.¹⁶⁴ In the Yuan, double payment was also required,¹⁶⁵ except for theft of cattle, which brought a ninefold penalty.¹⁶⁶ The Ming and Qing rejected double payment. The defendant was held liable only for the value of the goods taken.¹⁶⁷

159. The nonmonetary punishment was correspondingly lower than that of Tang, Ming and Qing. See Ch'en, *supra* note 148, at 54-55.

160. MacCormack, *supra* note 10, at 195.

161. *Id.* at 197.

162. See Sybille van der Sprenkel, *Legal Institutions in Manchu China* 76 (1966).

163. MacCormack, *supra* note 10, at 213.

164. Tang Code, *supra* note 88, art. 32; Johnson, *supra* note 88, at 180-82. If the defendant is charged with an act "comparable to robbery," then he does not suffer the double penalty. Art. 53. Attaining goods through fraud or cheating, and throwing away or destroying tallies, ensigns, or gate keys are acts "comparable to robbery." Art. 52 and subcommentary; Johnson at 262.

Further, article 32 provides that "the doubled amount of illicit goods repaid is confiscated by the State." Johnson at 180. This would seem to mean that the victim gets his original value, and the state the other half of the double penalty. But the subcommentary offers a different interpretation: If *A* is robbed by *B* who is in turn robbed by *C*, both *B* and *C* must pay double. *B*'s share, however, goes to *A* while *C*'s goes to the state.

As noted previously, robbery was redeemable in copper. Generally, the redemption went to the victim. Does the victim then get that amount too? One would think not. The victim is not entitled to the entire redemption. Rather, the redemption is used as a pool for restitution. If the victim has already been made whole, there would be no reason to compensate him further. This is all the more certain in light of article 32. In any event, some robberies were not redeemable, for example, those punished by penal servitude or more, which includes all robbery by force (*qiang dao*). Art. 11 and subcommentary; Johnson at 97-98.

165. See Ch'en, *supra* note 148, at 59-60.

166. *Id.* at 58.

167. MacCormack, *supra* note 10, at 221.

At first glance, the victim seems well-provided for under the codes. Closer examination, however, reveals numerous loopholes. In the Tang, for example, if an offender subject to death or exile had already spent the money or no longer had the ill-gotten goods in his possession, he would not have to make restitution. The explanation provided is that the law takes pity on the defendant. One wonders about the victim.¹⁶⁸ Further, if the loss to the victim results from the offender's use of the victim's property or failure to pay rent, the defendant need not make restitution. The victim is also out of luck should an amnesty be declared.¹⁶⁹ If a robber confessed, he was required to return the goods, but was not subject to double payment.¹⁷⁰ Double payment was also waived under certain conditions in the Yuan, for instance, where the thief and victim were related.¹⁷¹ In the Ming, if the thief died and the money or goods had been dissipated, the thief's family was not forced to make restitution.¹⁷² The law was more demanding in the Qing. The defendant's family had to pay up in all circumstances.¹⁷³ Indeed, the code even looked to the magistrate for compensation.¹⁷⁴

To be sure, there was a gap between what the code nominally required and what occurred in actual practice. The reality was considerably less victim-friendly. Government runners often demanded payment from victims to investigate and process cases. When goods were recovered, often only a small fraction would be reported, with the lion's share of the more valuable items divided up among the police.¹⁷⁵ One report noted that an influential victim might get half of the recovered goods back, if he was lucky. A less influential or fortunate victim "would get nothing but lies and excuses."¹⁷⁶

Restitution for damage to property was also irregular at best. The Tang code required the damage be intentional in some, though not all,

168. Tang Code, *supra* note 88, art. 33; Johnson, *supra* note 88, at 185.

169. With respect to robbery, fraud or bribery, amnesties did not relieve an offender of his duty to make restitution. He was allowed, however, to pay single rather than double value. Tang Code, *supra* note 88, art. 33 and subcommentary; Johnson, *supra* note 88, at 187.

170. Tang Code, *supra* note 88, art. 37; Johnson, *supra* note 88, at 201.

171. Ch'en, *supra* note 148, at 59-60.

172. MacCormack, *supra* note 10, at 233.

173. MacCormack, *supra* note 10, at 233 (citing Shen Jiaben's upper commentary); see also P.L.E. Philastre, *I Le Code Annamite* 199 (Taipei 1967).

174. Boulais, *supra* note 114, 167, substatute.

175. See Chu T'ung-tsu, *Local Government in China under the Ch'ing* 70 (1962).

176. *Id.* at 69.

instances.¹⁷⁷ Where restitution or compensation was not possible because of the nature of the object (e.g., tallies, seals, official documents, and gate keys), the wrongdoer was only punished.¹⁷⁸ The Ming and Qing seemed to be even more lax about restitution for property damage.¹⁷⁹ Further, as previously noted, Qing law tended to take more seriously and punish more severely damage to public as opposed to private property.¹⁸⁰

When victims were victimized by the legal system and falsely punished — an event of sufficient regularity to warrant an imperial edict¹⁸¹ — they were entitled to compensation under some circumstances. For instance, in the Tang, one wrongfully sentenced to penal servitude or life exile was forgiven two years of taxes and labor services for each year of time served. Were he executed or merely beaten, however, he (and his family) was not compensated.¹⁸² Once again, though not completely ignored, the interests of the victim are only partially attended to by the legal system.

D. The Procedural Role of the Victim

Compensation may be a primary concern of victims, but it is not their only concern. Victims often also seek greater participation in and control over the legal proceedings. Unfortunately, generalizations about the procedural law of premodern China are even more dubious than generalizations about the substantive law. Not only is less information available, but available information suggests that procedures varied over time and place. This section simply highlights certain aspects of the Qing criminal process particularly relevant to the victim.

Qing law was quite liberal in allowing virtually anybody to bring a complaint. Whether one would want to bring suit is another issue.

177. For intent as a necessary condition, see Tang Code, *supra* note 88, art. 434 (damage caused by fire or water), art. 445 (damage to public property in government storehouses), art. 441 (waste of fruit from orchard). For intention irrelevant, see art. 203 (killing or injuring a domestic animal); arts. 276 and 443 (damage to religious objects, tombs, Buddhist and Daoist statues and so forth).

178. Tang Code, *supra* note 88, art. 445; MacCormack, *supra* note 10, at 226.

179. MacCormack, *supra* note 10, at 228.

180. See *supra* note 90 and accompanying text.

181. See Bodde & Morris, *supra* note 10, at 470 (imperial edict acknowledging recent spate of improper executions). Amnesties were regularly decreed in all dynasties, in part because rulers worried about wrongfully punished innocents. See Chu, *supra* note 65, at 214.

182. Tang Code, *supra* note 88, art. 44; Johnson, *supra* note 88, at 16.

Initiating legal action subjected one to great risk and expense. Indeed, an imperial edict of 1736 warned: "Before a legal case is tried and concluded the plaintiff and defendant have spent a large sum of money, so that both of them are in great distress."¹⁸³ Runners would extort fees from both the plaintiff and defendant simply to bring them to court for trial and would refuse to allow the parties to see the magistrate or return home unless the pot was further sweetened.¹⁸⁴ Before investigating a theft, runners would often demand that a victim provide not only travel, food and drink expenses but also a reward.¹⁸⁵ The pitfalls of even successful litigation are enshrined in the Chinese proverb: "win your lawsuit and lose your money."¹⁸⁶ The expense surely dissuaded many victims from pursuing a rightful claim. As the saying goes, "if the six doors of the yamen are open wide, those who have right on their side but have no money will not enter."¹⁸⁷

Should a victim decide to press ahead, something akin to contemporary victim impact statements was compiled. This report (*tongxiang*) described the magistrate's investigation and included statements of the victim and other concerned parties. An official document of the court, it was stamped and sealed.¹⁸⁸

Once the trial began, all parties — the defendant, plaintiff and witnesses — were required to kneel.¹⁸⁹ Officials were not compelled to appear in court with a commoner as plaintiff or defendant.¹⁹⁰ During the Song and Yuan, an official could submit a written statement in lieu of personal appearance.¹⁹¹ In the Ming and Qing, one could send a family member or servant as one's proxy, at least for certain

183. Chu, *supra* note 175, at 50.

184. *Id.* at 66.

185. *Id.* at 69. For a practicing magistrate's account of abusive runners, see Huang Liuhong, *supra* note 153, at 256-57.

186. Van der Sprenkel, *supra* note 162, at 135.

187. *Id.* at 138.

188. Shiga Shuzo, *Criminal Procedure in the Ch'ing Dynasty*, 32 *Memoirs of the Research Dept. of the Tokyo Bunko* 1, 27 (1974).

189. Chu, *supra* note 175, at 125.

190. *Id.* at 174.

191. For the Song, see Ichisada Miyazaki, *The Administration of Justice During the Sung Dynasty*, in *Essays on China's Legal Tradition*, *supra* note 138, at 60; for the Yuan, see Chu, *supra* note 65, at 184.

crimes.¹⁹² The victim cum plaintiff sometimes had relatives stand, or rather kneel, in for him.

The Chinese system was, and is, inquisitorial. The accused could deny the charge, and the victim could challenge the defendant's version of the facts.¹⁹³ Almost invariably, someone was found guilty. Indeed, for both parties to be judged at fault was not uncommon. Should the magistrate have difficulty ferreting out the truth, he was permitted to torture not only the defendant but the plaintiff and witnesses as well.¹⁹⁴ When the accused was able to withstand the pressure to "confess," the accuser found himself in dire straits. Under the doctrine of *fan zuo*, anyone who falsely accused another would suffer the punishment of the crime alleged.¹⁹⁵ How many victims "confessed" under torture to their own victimization is difficult to discern.

Once a verdict in a civil or minor criminal suit was reached, the decision was shown and read to the plaintiff and defendant, who then signed a statement accepting the judgment.¹⁹⁶ More serious criminal cases involving exile or execution required approval of superior officials.

The parties had the opportunity to appeal at every turn. If upon complaint, the magistrate decided not to pursue the case, one could appeal.¹⁹⁷ When a murder occurred, the magistrate and coroner were required to conduct an inquest. A member of the victim's family who disagreed with the result could appeal to a higher authority.¹⁹⁸ As noted above, serious cases were automatically reviewed. A district magistrate was only authorized to impose a punishment of beating or cangue; a governor could decide cases resulting in temporary banishment; the Board of Punishments reviewed permanent or military exile and homicide cases; and the Emperor personally approved all

192. Chu, *supra* note 65, at 184. But see Shiga, *supra* note 188, at 42 n.180 (substatute requires that even members of Imperial family when criminally accused must kneel just like a commoner during hearings).

193. For the Song, see Miyazaki, *supra* note 191, at 61.

194. Huang Liuhong, *supra* note 153, at 39-40. Senior citizens and pregnant women were not permitted to be the chief plaintiff, not because they could not kneel, but because they were legally exempt from beating, the punishment for one who submitted a false statement. See Miyazaki, *supra* note 191, at 60. At least one magistrate, however, recommended the elderly and women be allowed to wait outside until needed. See Huang Liuhong, *supra* note 153, at 272.

195. Van der Sprenkel, *supra* note 162, at 67 n.1 (citing Stauton, 1810, p. 364).

196. Chu, *supra* note 65, at 126.

197. Huang Liuhong, *supra* note 153, at 255; Shiga, *supra* note 188, at 31.

198. Chu, *supra* note 175, at 120.

capital cases.¹⁹⁹ The defendant could retract his confession at any point.²⁰⁰ Even in minor cases, a party who felt unjustly treated could appeal to increasingly higher levels. Remarkably, one could pursue one's claim all the way to the emperor.²⁰¹ A dissatisfied party attracted the attention of the emperor by kneeling at the gate, "stopping the sedan" when the emperor was travelling or beating a gong outside the imperial palace.²⁰² Should all else fail, officials at various levels were regularly sent on rounds to visit jails, check on lower courts, and verify that justice prevailed.²⁰³

Of course winning the case did not end one's problems. If damages were awarded, one still had to collect. How effectively nonphysical punishments were enforced is uncertain. There is no reason to suspect that the magistrate's rapacious staff was any less rapacious after the trial. At the end of a long and arduous road, the victim may have ended up empty-handed. Executions, however, were public. Thus the victim could have the gratification of watching the criminal strangled or decapitated.

At first blush, the Chinese system seems remarkably victim-oriented. Punishment is a function of victim harm, often calibrated to the particular characteristics and status of the victim. In many instances, the victim or the victim's family is compensated for loss of life, personal injury, theft or property damage. And any victim can bring a complaint and then pursue it to the highest levels, having his say at each stage along the way.

However, on stricter scrutiny, the system turns out to be not so victim-friendly after all. Although the victim is able to bring suit and appeal, the process is hardly the therapeutic one envisioned by many victims' rights advocates today. The system is much more concerned with punishing the criminal than catering to the psychological and emotional needs of the victim. The Qing law simply provides, for

199. Shiga, *supra* note 188, at 16-19. There were certain exceptions, however, for immediate execution of criminals guilty of particularly heinous acts. *Id.* at 21-22.

200. *Id.* at 25.

201. *Id.* at 30, especially n.120.

202. *Id.* at 33 and n.133. For all intents and purposes, the gong was largely symbolic. Further, a statute in the Qing Code imposed a sentence of military banishment on those who knelt in front of the imperial gate in hopes of appealing directly to the emperor. *Id.*

203. *Id.* at 37-8.

instance, that a rape victim “shall not be liable for punishment.”²⁰⁴ So much for victim sensitivity.

Compensation was given only irregularly. Some classes of crimes are not compensated at all, others only if a myriad of conditions are met. The defendant, meanwhile, is able to take advantage of a host of excusing provisions.²⁰⁵ When compensation is provided, it is not, like punishment, calibrated to the particular victim. That one received a flat fee for accidental homicide regardless of the financial impact on the particular victim’s family indicates that the primary purpose was not so much compensation as punishment.²⁰⁶ The penal focus is also borne out by the fact that defendants only had to pay the funeral expenses of a homicide victim when they benefitted from the leniency of the state. To keep the scales of punishment balanced, the state had to make sure it extracted a pound of flesh. If half a pound came in the form of silver, so be it. Similarly, the payment of a double fee for robbery in the Tang is imposed more with an eye to punishment and deterrence than victim welfare.

How is one to explain the relative indifference to the plight of the victim in the premodern system? As discussed previously, the ideals of social and cosmic harmony central to Confucianism and the naturalist Huang-Lao school would seem to put a premium on the welfare of the victim. Practical limitations are of course one factor. Like many states today, premodern China arguably could not have afforded to fully compensate every crime victim. But compensation is only one concern of victims. A more victim-oriented procedure could have been devised with little or no additional cost.

One could perhaps point the finger at the Legalists. They after all emphasized punishment, and more specifically, the fitting of punishment to the crime rather than to the criminal or victim. Perhaps more importantly, Legalist theory elevated the interests of the state over those of the particular parties.²⁰⁷

204. Van der Sprenkel, *supra* note 162, at 76.

205. See, e.g., *supra* notes 168-82 and accompanying text. Such provisions go back at least to the Qin. A recently discovered statute provides that where a robber steals clothes and then sells them for cloth, he must give the cloth to the victim if caught. But the victim is not able to get his original clothes back from the bona fide purchaser. Hulsewe, *supra* note 88, at 126 (D20).

206. Cf. Bodde & Morris, *supra* note 10, at 342 (accidental killing of four where judge requires payment of only 12.42 oz. of silver instead of 48.8 oz.).

207. A case could perhaps be made that all schools of Chinese thought privilege the collective and state over the individual. Certainly that has been the truth in practice.

Whether due to the influence of Legalism or not, there is some truth to the observation that the criminal system serves the interests of the state rather than the individual parties. As noted previously, the state has an interest in discouraging litigation and encouraging resolution of disputes through informal channels. The heavy penalties imposed on those overly eager to litigate provide an unsubtle incentive to exhaust first the wide array of privately available means, including the guild, clan (*zu*) and customary law alternatives.²⁰⁸ Interpreted charitably, the state promotes these alternatives to litigation in the belief that the informal "Confucian" approach aimed at mediation and conciliation is better able to achieve a particularized justice that addresses the needs and circumstances of all parties, including the victim.

These "extralegal" mechanisms have the potential to be very responsive to the needs of the victim. By its very nature, the mediation process can be psychologically empowering. The victim participates fully. He is able to confront the perpetrator, air his grievances, and give his opinion at every stage. The informal setting allows both parties to save face, thereby facilitating compromise and consensus. As a result, both parties can take responsibility for the final outcome. Compensation, if forthcoming, can be tailored to the particular needs and abilities of the parties. No doubt a victim might not receive all he hoped for. But although one might have to compromise, one gains the psychological benefit of having played an active role in shaping the outcome. In addition, everyone saves face, damaged relations are patched up, and grudges circumvented.

Admittedly, the process might not work so smoothly in practice. The lack of formal oversight makes abuse possible. The mediator might be corrupt, and one party may be able to take advantage of his personal connections (*guan xi*) to skew the process. Further, the social pressure to accept a compromise can be overwhelming, thereby giving rise to feelings of powerlessness and vulnerability. Moreover, not all problems lend themselves to resolution through mediation.

Confucianism has always recognized that the state must step in when the informal system fails, as in the case of murder and other violent crimes, and when the state itself is threatened, as in the case of treason and public property damage. Once forced to intervene, the state must attempt damage control. In most instances, the opportunity to

208. For a discussion of these "extralegal" institutions, see Van der Sprenkel, *supra* note 162, at 80-111.

restore harmony has slipped away²⁰⁹ — or never existed, as in the case of rape or murder. At this point, the focus shifts from restoration of harmony to deterrence of future behavior and punishment for past misdeeds. The state continues to have an interest in education, rehabilitation and restoration of harmony. But the main business becomes punishment, and punishment is not a good tool for restoring harmony. How can punishing one make the other whole? Regrettably perhaps, the interests of the victim must take a back seat to those of the state in such situations.

IV. SOCIALIST CHINA

Post-liberation Maoist China did not produce a comprehensive substantive or procedural criminal law. Various government documents and directives were circulated, however, and laws were passed from time to time. In addition, several constitutions were promulgated containing provisions pertaining to criminal law matters. As the multiplicity of constitutions indicates, the Maoist period was one of great flux and experimentation. The legal system was no exception. The status and importance of the legal system rose and fell as the official attitude toward the judiciary and law swung radically. One moment the government promoted a professionally trained and operated judiciary and the next the “mass line” and other legally less formal and specialized means of administering justice.²¹⁰ The lack of a comprehensive code and the radical shifts in legal theory and practice make generalizations about the Maoist era difficult. Accordingly, discussion of the victim in Maoist China will be limited to general principles gleaned from available materials and case studies.

When one turns to contemporary China, the situation is somewhat different. With the ascension of Deng Xiaoping, the government began to emphasize the need for rule of law. One significant step toward this

209. This is one reason why both sides often are punished. To have reached the stage where the state must step in, both sides must have failed in their social duty to seek a harmonious resolution.

210. For an overview of law in the post-Qing, pre-liberation era, see Shao-Chuan Leng, *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* 1-26 (1967). For law in the Maoist China, see Alice Tay, *The Struggle for Law in China*, 21 U. Brit. Colum. L. Rev. 561 (1987); Cohen, *supra* note 82; Victor Li, *supra* note 87. For a study of law from the post-Mao era to mid-1980s and an overview of the Mao era, see Leng & Chiu, *supra* note 87.

end was the enactment of a substantive and procedural criminal code.²¹¹ Unfortunately, the status of the victim in contemporary China remains clouded. Despite the call for rule of law and the enactment of the criminal code, opposition in theory and deviation in practice remain the hallmarks of the Chinese legal system.²¹² The lack of adequate information about the actual treatment of victims and the exercise of rights by victims in practice makes dubious simple reliance on the criminal code as an indicator of the victim's position. Nevertheless, by piecing together complaints from citizens in the press, criticisms by legal scholars in law review articles, and information attained through personal communication with law professors and practitioners, a general picture may be drawn of the victim in China today.

A. Victim Harm

Harm to the victim remains an important factor in grading offenses. Numerous articles of the contemporary criminal code stipulate heavier or lighter punishment depending on the degree of victim harm, for instance the gravity of personal injury or the amount of property damage suffered by the victim.²¹³ In socialist China, however, of even greater concern than victim harm is social harm. The criminal code explicitly provides that punishment is to be meted on the basis of the degree of harm to society.²¹⁴ Some articles specifically link enhanced punishment to serious social harm. For instance, article 158 states: "The use by any person of any means to disturb the social order is prohibited. When the circumstances . . . are serious . . . and society suffers serious losses, ringleaders are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control or deprivation of political rights." Most articles, however, merely refer to "serious," "odious" or "especially odious" consequences or circumstances.²¹⁵

211. *Zhonghua Renmin Gongheguo Xingfa* [Criminal Law of the People's Republic of China], *Zhonghua Renmin Gongheguo Xingshi Susongfa* [Criminal Procedure Law of the People's Republic of China] (adopted July 1, 1979, effective Jan. 1, 1980) [hereinafter *Criminal Law* and *Criminal Procedure Law*, respectively].

212. On the deviation in practice, see Li Maoguan, *Why Laws Go Unenforced*, 32 *Beijing Rev.* 13 (1989). For resistance in theory, see *infra* notes 262-63 and accompanying text.

213. See, e.g., *Criminal Law*, *supra* note 211, arts. 106, 136, 137, 139, 143, 150, 182.

214. *Criminal Law*, *supra* note 211, art. 57. The principal legal treatise of the early Mao period states that sentencing must be based on the amount of social danger. See Cohen, *supra* note 82, at 509.

215. See, e.g., *Criminal Law*, *supra* note 211, arts. 111, 113, 114, 133, 135, 164.

As in premodern China, the formal legal system is concerned primarily with interests of the state and society as a whole. As one victims' rights advocate has observed, the authorities "by and large consider how to uphold the public good of society through punishment rather than the needs and rights of victims."²¹⁶

B. Victim Status

Status was of crucial importance during the rein of Mao. To be sure, Article 85 of the 1954 Constitution provided nominal equality before the law for all citizens. Further, the Law for the Organization of People's Courts declared: "In the adjudication of cases by people's courts, the law shall be applied uniformly to all citizens, irrespective of their nationality, race, sex, occupation, social origin, religious belief, level of education, property status, or duration of residence."²¹⁷ But the reality differed considerably, influenced more by Mao's distinction between two contradictions than the stated law. As noted previously, Mao distinguished between crimes committed by the people and enemies of people. The latter included the so-called five black elements, i.e., landlords, rich peasants, counterrevolutionaries, rightists and "other bad elements."²¹⁸ Enemies were to be dealt with harshly, while others — most notably workers, peasants and soldiers — were to be treated more leniently.²¹⁹

Post-Mao China has attempted to restore equality before the law. A Communique of the Third Plenary Session of the Eleventh Central Committee in 1978 declared that judicial organs must "guarantee the equality of all people before the people's laws and deny anyone the privilege of being above the law."²²⁰ In practice, the government removed the negative labels attached to landlords and rich peasants, and restored their political and civil rights.²²¹ The so-called bad elements and enemies of state persecuted during Mao's tenure were rehabilitated (*ping fan*), often posthumously. Once again, a constitution reconfirmed that "all citizens of the People's Republic of China are equal before the

216. Wang Yanjun, *supra* note 8, at 38.

217. Article 5, cited in Cohen, *supra* note 82, at 510.

218. See Leng & Chiu, *supra* note 87, at 21, 104.

219. See, e.g., Cohen, *supra* note 82, at 508-12.

220. Communique of the Third Plenary Session of the 11th Central Committee of the Communist Part of China, 21 Peking Rev. 6 (1978); see also Leng & Chiu, *supra* note 87, at 39.

221. Leng & Chiu, *supra* note 87, at 39.

law;²²² and the Criminal Procedure Law declared the law equally applicable to all.²²³

Of course, certain distinctions still exist. For instance, provisions grant special protection to victims who are minors by holding the offender strictly liable.²²⁴ More importantly, the status of the parties, especially of the criminal, is still often a factor in practice.²²⁵ Nevertheless, the current system differs considerably both in name and reality from that of premodern or Maoist China. Ironically, while China is moving away from a status-centered system, the U.S. is moving toward such a system, at least with respect to victims.²²⁶

C. *Victim Compensation*

China has yet to enact legislation mandating state-funded compensation for crime victims.²²⁷ Article 31 of the Criminal Law provides, however: "Where the victim has suffered economic loss as a result of a criminal act, the criminal element . . . shall in accordance with the circumstances be sentenced to make compensation for the

222. Zhonghua Renmin Gongheguo Xianfa [Constitution of the People's Republic of China] art. 33 (1982) [hereinafter PRC Const.].

223. Criminal Procedure Law, *supra* note 211, art. 4.

224. See, e.g., Criminal Law, *supra* note 211, art. 113 (statutory rape); art. 183 (failure to provide for young); art. 184 (abduction of female minors under 14 years old). See also art. 14, which provides for reduced punishment for minor defendants.

225. Leng & Chiu, *supra* note 87, at 106-108.

226. Cf. Payne, 111 S. Ct. 2597 (1991). In Payne, the Supreme Court reasoned that recognition of the characteristics of the victim was an important gain for the victim and the victims' rights movement. Evidence of the characteristics of the victim could be used to offset the mitigating evidence introduced by the defendant. For the contrary view that Payne did not advance the cause of victims, see Vivian Berger, *Payne and Suffering — A Personal Reflection and a Victim-centered Critique*, 20 Fla. St. U. L. Rev. 21 (1992).

227. Victims of the administrative arm of the criminal justice system (which includes the procuratorate but not the courts) may now seek relief under the recently enacted Administrative Litigation Law. See Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Litigation Law of the PRC] (promulgated Apr. 4, 1989), arts. 11, 65, 67-68, reprinted in Renmin Ribao, Apr. 10, 1989, at 2, trans. in China Law and Practice, June 5, 1989, at 37-57.

According to one law review article, abuse by the legal system is far from uncommon. One study examined 276 cases "sifted out" for review from 1120 counterrevolutionary and political offense cases. Of those reviewed, 36 were wrongly decided, including two cases culminating in wrongful execution. Zeng Longze, Xingshi sunhai peichang zhidu quyī [The Direction of the Criminal Loss Compensation System], 2 Zhongguo Faxue 96 (1988).

For a study of compensation to victims of the criminal justice system in Maoist China, see Fukushima Masao, *Chinese Legal Affairs (Second Discussion)*, in Chugoku no Ho to Shakai 47 (1960), cited in Cohen, *supra* note 82, at 583. See also Cohen, *supra* note 82, at 582-84.

economic loss.” The Criminal Procedure Law grants the victim “who has suffered material losses because of the defendant’s criminal act” the right to bring a supplementary civil action.²²⁸

Commentators have raised several criticisms. For starters, there is no statutory or legislative definition of “victim.” In the U.S., state legislatures have defined *victim* in a variety of ways. Some have adopted a broad definition of a victim as the one against whom a crime has been committed or who has suffered as a result of a crime.²²⁹ Others have limited the scope of the term through reference to the nature or results of the offense.²³⁰

The practice in China, according to Xia Chenghua, is to limit the scope of “victim” to one directly encroached upon by criminals during the commission of a crime.²³¹ As Xia points out, however, this definition is excessively narrow. Sometimes the harm does not arise until much later,²³² and persons other than the immediate object of the

228. Criminal Procedure Law, *supra* note 211, art. 53.

229. See, e.g., Ind. Code Ann § 35-35-3-1; Wis. Stat. Ann. § 950.02.

230. See Maureen McLeod, Victim Participation in Sentencing, 22 *Crim. L. Bull.* 501, 509 (1986). The United Nations has adopted an extremely broad definition:

“Victims” means persons, who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member State, including those laws proscribing abuse of power.

A person may be considered a victim, under the Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of familial relationship between the perpetrator and victim. The term “victim” also includes, where appropriate, the immediate family or dependents of the direct victim and person who have suffered harm in intervening to assist victims in distress or to prevent victimization.

G.A. Res. 40/34, 40 U.N. GAOR, Sess. Supp. No. 53, at 213-25, U.N. Doc. A/40/53 (1986). The U.N. proclamation and definition have been cited by several Chinese authors. See e.g., Zhao Junru & Li Shenglong, *Woguo faren fanzui lifa tansuo*, 3 *Modern L. & Science* 55, 56 (1989) (supporting UN’s broad definition); Su Huiyu & Lin Jianhua, *supra* note 6, at 41; Wang Yanjun, *supra* note 8, at 36.

231. Xia Chenghua, *supra* note 8, at 37.

232. To illustrate, Xia cites the following case: In May, A contracted with B to build a house in September. The prices of bricks rose in the interim. A wanted to modify the contract, but B refused. During the rainy season of the following year, the house collapsed (in part because A used substandard materials), and B was seriously injured. The legal harm, the injury, did not occur until the criminal activity had ceased. *Id.* at 37.

crime, including one's family, may be harmed as well. Nor does the definition contemplate legal persons.²³³

Others find objectionable the narrow statutory limitation on compensable harm. Whereas the civil law compensates damage to one's name, reputation and so forth,²³⁴ the criminal law draws the line at material and economic damage. Victim advocates have argued that nonmaterial damages such as pain and suffering ought also be compensated.²³⁵

From the victim's standpoint, the above concerns pale in comparison to the lack of a state-funded compensation system. In the absence of such a system, the financial burden is shouldered by the defendant. Because many defendants are judgment-proof or have insufficient resources to render full compensation, the victim invariably bears much if not all of the loss. In a relatively poor country such as China, the results can be devastating. Where the defendant is judgment-proof, the victim generally must fall back on family support.²³⁶

D. The Procedural Role of the Victim

As noted, Maoist China lacked a formal criminal procedure law. Different agencies were charged with dispensing justice depending on the nature of the offense and the type of sanction. Work and residential units handled minor offenses through informal sanctions. The police

233. *Id.* at 38 (recommending victim status be extended to legal person); see also Xu Zhangrun, *supra* note 8, at 30.

234. Zhonghua Renmin Gongheguo Minfa Tongze [General principles of the civil code of the People's Republic of China], art. 120 (adopted Apr. 12, 1986) [hereinafter Civil Code].

235. Hu Chi, *supra* note 46, at 80; Li Defa, *supra* note 46, at 53.

236. A crime victim who has no family and cannot earn a living may apply for government assistance. Under civil law, one killed, injured or crippled by a public entity may obtain economic and material compensation from one's work unit. Civil Code, *supra* note 234, art. 121. And if one dies heroically sacrificing for the country and is deemed a martyr, then the state will grant a pension to one's survivors. See PRC Const., *supra* note 222, art. 45. Should the victim be injured by the criminal acts of one acting as agent of a work unit, the victim may seek redress from the offender's unit. Su Huiyu & Lin Jianhua, *supra* note 6, at 45.

In the Maoist era, government compensation was possible in some instances. One case involving property damage is particularly illuminating. A mentally incompetent person started a fire that destroyed a house, resulting in damage of 700 yuan. The court ordered the defendant's family to pay the victim 100 yuan and the local government to contribute 200. Realizing the victim would still bear much of the loss, the local Party secretary had the victim's production unit rebuild the house for free. Cohen, *supra* note 82, at 233-34; see also *id.* at 223. Nevertheless, in the absence of a legislatively enacted plan, victim compensation remained a piecemeal, case by case phenomenon.

imposed administrative sanctions ranging from informal warnings and fines to reeducation through labor. The courts were responsible for punishing major criminal offenses. In reality, the legal system often eschewed reliance on legal experts and formal regulations in favor of a rougher form of popular justice.²³⁷

At one end of the informal spectrum lay mediation. Disputes were resolved outside the courts, sometimes with the assistance of a village or neighborhood elder, other times under the guidance of local Party officials, neighborhood committees or the police. The advantages and disadvantages to the victim of such a process have already been discussed.²³⁸

Some violations required more than mere mediation. Depending on a variety of factors — the nature and severity of one's offense, one's background, prior record and so forth — one could be exposed to a host of increasingly severe informal sanctions, ranging from private criticism and education to public criticism to censure to struggle.²³⁹ There were in fact different forms of struggle. The lesser form exposed one to "intense vituperation from those in attendance, amid shaking fists, shouts, and accusing fingers."²⁴⁰ The more severe form often resulted in physical violence. Victims could participate in these various procedures — criticizing,²⁴¹ denouncing and perhaps even beating the perpetrator. By and large, however, the more serious forms of sanction such as struggle were reserved for those guilty of harms to society or political crimes, though the scope of social harm or "political" crime could be extraordinarily broad.

The emphasis on informal procedures fit well with Mao's distrust of legal specialists and "mass line" approach to the law. One feature of the mass line method was judicial solicitation of the people's opinions and suggestions about the case at hand. Such a system would appear to give the victim an opportunity to air his view. In practice, however, participant responses were scripted in advance, at least in serious

237. Leng & Chiu, *supra* note 87, at 25-28.

238. See *supra* note 207 and accompanying text; see also Victor Li, *supra* note 87, at 38-67; Cohen, *supra* note 82, at 141-153. See generally Fu Hualing, *Understanding People's Mediation in Post-Mao China*, 6 *J. Chinese L.* 211 (1992).

239. See Cohen, *supra* note 82, at 20.

240. *Id.*

241. Victims could also denounce their nemesis through big character posters hung up in public places. *Id.* at 163-64.

cases.²⁴² Scripting was even more commonplace in the politically motivated mass trials in which tens of thousands might participate. Such trials clearly were not concerned with the plight of the individual victim.

The enactment of a criminal procedure law in 1980 granted formal rights to the victim. Today the victim has the right to bring a supplementary civil suit,²⁴³ and in certain instances the right of private prosecution.²⁴⁴ In addition, article 87 of the Criminal Procedure Law provides that where the victim is unable to bring a complaint because of coercion or intimidation, the people's procuratorate or close relatives of the victim may initiate action.²⁴⁵

Other procedural rights include the right to identify suspects,²⁴⁶ cross-examine the defendant and witnesses (with the approval of the judge),²⁴⁷ and make a statement after the state has presented its case and before defense responds.²⁴⁸ The victim may appeal a procuratorate's decision not to prosecute²⁴⁹ and a court of first instance's verdict with respect to the victim's supplementary civil suit.²⁵⁰ The victim and his family (and indeed any citizen) "may

242. Leng & Chiu, *supra* note 87, at 24.

243. Criminal Procedure Law, *supra* note 211, art. 53.

244. Some offenses are prosecuted only if the victim brings suit. See Criminal Law, *supra* note 211, arts. 145 (public insult or defamation), 179 (use of violence to interfere in marriage), 182 (abuse of a member of one's family). A Supreme Court Notice (Dec. 25, 1975) added to the list of privately prosecuted offenses those stipulated in Articles 134 (intentional injury but cause and effect is clear and injury is minor); 157 (obstruction of state personnel or refusal to carry out the judgment of the court); 180 (bigamy); 181 (cohabitating with or marrying spouse of PLA member); 183 (failure to support aged, children, sick or otherwise legally dependent person). Privately prosecuted cases, which may be handled directly by the people's court, are allowed because the offenses involve primarily private harm between mutual acquaintances. Yang Shi, *supra* note 50, at 38.

245. There is some debate whether one's relatives or a legal representative can initiate action without the consent of a competent victim. See Shen Chanpei, *supra* note 8, at 45 (arguing that consent is required); Ma Yiqing, Xingshi zisu anjian chutan [Preliminary Discussion of Criminal Private Suit Cases], 5 Faxue Yanjiu 57, 58 (1985) (arguing the same).

246. Criminal Procedure Law, *supra* note 211, art. 41.

247. *Id.* arts. 36 and 114.

248. *Id.* art. 118.

249. *Id.* art. 102.

250. *Id.* art. 129. Pointing to excessive appeals, some have questioned the victim's right to appeal, arguing that i) victim's and/or their families ought not be given standing to appeal, or ii) conditions ought to be imposed on their right to sue. Cf. Wang Minyuan, Woguo xingshi shensu zhidu tanxi [Exploration of the Criminal Appeals System in the PRC], 6 Faxue Yanjiu 40 (1990). While Wang believes that victims ought to have standing, he also believes that limits should be imposed on victim's right to appeal. Such limits include: i) one must point to particular errors in the prosecutor's decision not to prosecute, rather than simply bringing an appeal without reason, and ii) if the prosecutor made an informed decision based on all available evidence, then one

present petitions regarding judgments or orders that have already become legally effective . . . but the execution of such judgments or orders cannot be suspended.”²⁵¹

Despite the array of procedural rights, the victim is not as well off as one might expect.²⁵² In practice, victims often do not take advantage of the right to bring supplementary civil or privately prosecuted suits. One reason may be the aforementioned lack of a state-funded compensation system.²⁵³ Prosecutors, moreover, are often hostile to such suits. Some fear that the criminal process may become bogged down in lengthy private disputes while serious offenses against the state are neglected.²⁵⁴ Others believe that a defendant who is subject to punishment has already paid his dues to society. To require compensation for the victim is to over punish. Either the punishment must be reduced or the compensation forgone.²⁵⁵ Traditional fear of the legal system may also explain the reluctance of victims to pursue their legal rights.²⁵⁶ Many may feel the best way to resolve the conflict is through informal means. Indeed, even if they do seek legal redress, victims may find themselves forced into mediation. Article 127 states that “A people’s court may conduct mediation in a case of private prosecution; before the judgment is announced, a private prosecutor may arrange a settlement on his own with the defendant or may withdraw his private prosecution.”²⁵⁷

Even the rights provided are not as expansive as some would like. Though victims do have the right to appeal certain decisions, they are

ought not be able to appeal unless new evidence is available.

251. Criminal Procedure Law, *supra* note 211, art. 148. But see art. 149, which provides that on finding of error, the Supreme People’s Court has the right to adjudicate or remand the case to the lower court for readjudication. Apparently, art. 149 refers to errors discovered in ways other than by petition of the victim and his or her family or legal representative.

252. U.S. victim advocates raise similar complaints. See Young, *supra* note 4, at 52 (attention to victim is simply a “rhetorical facade behind which it is business as usual”).

253. Compensation remains problematic even in those instances where one is entitled to seek redress either from one’s own or the defendant’s work unit: often the victim is shuttled back and forth as both units try to pass the buck. Chen Yue, *supra* note 8, at 67; Liu Defa, *supra* note 46, at 54.

254. Cf. Ma Yiqing, *supra* note 245, at 59 (noting litany of prosecutor’s complaints and advocating time limit for settling supplementary civil suits).

255. Cf. Su Huiyu & Lin Jianhua, *supra* note 6, at 46.

256. Li Maoguan, *supra* note 212; Wang Yanjun, *supra* note 8, at 38.

257. See also Criminal Procedure Law, *supra* note 211, art. 13 (“Minor criminal cases that may be handled only upon complaint and others that do not require the conducting of an investigation are to be accepted directly by the people’s courts, and mediation may be carried out.”).

not technically a "party" to a publicly prosecuted law and hence cannot appeal the court's decision as to the guilt or sentence of the defendant.²⁵⁸ Some have argued that the victim ought to be considered a party, or at least given the right to appeal.²⁵⁹ Similarly, though victims have the right to speak at trial, they must first attain permission from the judge. Perhaps for most victims a greater constraint on speaking than the need to attain the judge's permission is the lack of legal sophistication. Unsure of the law and wary of the formal legal process, many victims simply choose to remain silent.

V. CONCLUSION

Although not completely neglected, the victim remains a relatively minor player in the contemporary criminal system.²⁶⁰ The reasons for this are several. In response to victims' demand for a state-funded compensation system, the government can plead poverty. China is not a rich country. Arguably, it simply does not have the funds to make victims whole. Given the traditional emphasis on family, the state may also believe that family members have a duty to support each other in difficult times. Alternatively, even if families are under no such obligation, the state may believe social welfare is most equitably and efficiently borne by the family in a poor country such as China. At any rate, China is no worse in this regard than many other countries, including more wealthy ones. Indeed, victim compensation has become an issue on the international agenda only recently, and full realization of the goal remains a distant event.²⁶¹

Compensation is not, however, the only item on the victims' agenda. The legal system's relative lack of concern for the emotional and psychological needs of the victim, for instance, cannot be explained away merely by citing insufficient funds. A more far-reaching explanation is that the interests of the state continue to dominate penal

258. See Hu Xiqing, *Luelun woguo xingshi susong zhuti* [On the Subject of Criminal Litigation in the PRC], 1 *Faxue Yanjiu* 45, 46, 49 (1986) (victim is not a party, except in privately prosecuted or supplementary civil suit).

259. Pei Cangling, *supra* note 8, at 18-19 (arguing victims ought to be considered a party and afforded the right to petition for recusal, initiate suits and appeal); Huang Mingli, *supra* note 8, *passim* (advocating right of appeal for victims).

260. U.S. studies also indicate that the victim remains a minor figure. See Davis, *supra* note 33, at 290-93. See also Young, *supra* note 4, at 52.

261. See Dolliver, *supra* note 45, at 93 (noting inadequacy of current compensation systems in U.S.); see also Young, *supra* note 4, at 53.

theory and practice. More interested in harm to society than to an individual victim, the socialist criminal system takes as its primary task the prevention and punishment of crimes that seriously disrupt the public order. Private disputes may be settled outside the formal legal process through informal channels arguably better able to render particularized justice and restore harmony.

On a more ideological level, Marxist theory exacerbates the historical tendency to privilege state's interests over those of the individual victim — notwithstanding its humanitarian rhetoric. As a tool of socialism, the law must serve the Party rather than individuals. Such ideas retain their currency despite repeated calls for a rule of law independent of Party control. Justice Minister Cai Cheng recently declared:

Chinese law must be at the service of class struggle . . . there can be no question of “the law being supreme”. . . . China must jettison the concept of “the supremacy of the law” because the judicial code and system must be at the service of the proletariat class.²⁶²

Ren Jianxin, President of the Supreme Court, expressed similar sentiments:

The independent exercise of judicial power by the people's courts occurs under the leadership of the Party. In order to adhere to [that principle] the independent exercise of judicial power by the people's courts must be supervised and supported . . . courts at all levels must consciously keep aligned with the central Party line, obey orders, listen to commands.²⁶³

On an even more abstract philosophical level, there is no Chinese parallel to the Lockean fable of individuals in the state of nature, already possessing natural rights, who by consenting to a social contract create and empower the state. In the Chinese political world, rights are a product of positive law, granted by (and for the benefit of) the state. When the rights of individuals conflict with the interests of the state, the

262. S. China Morning Post, Nov. 12, 1991, at 26.

263. Renmin ribao haiwaiban [People's Daily Overseas Edition], Jan. 6, 1990.

former must give way. The Constitution makes this abundantly clear: "The exercise by citizens . . . of their freedoms and rights may not infringe upon the interests of the state, of society and the collective. . . ." ²⁶⁴

Of course the interests of the victim and the state need not be in opposition. Nevertheless, the lack of a rights culture fosters an environment in which the leviathan simply overlooks and hence crushes the minnow. This is not to say China lacks the conceptual tools to develop a victim-sensitive legal culture. The Confucian emphasis on restoration of harmony and justice tailored to the particulars of the individual parties may already serve the victim well in "extralegal" informal channels. More importantly, such values could be incorporated into the formal process. How well this is accomplished will be the test of how well the victim fares in the Chinese legal process.

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264. 1982 PRC. Const., *supra* note 222, art. 51.

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